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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-sixth session

SUMMARY RECORD OF THE 501st MEETING

Held at the Vienna International Centre, Vienna,
on Thursday, 8 July 1993, at 2 p.m.

Chairman: Mr. MOHAMMED (Nigeria)

CONTENTS

New international economic order: procurement (continued)

Consideration of draft Model Law on Procurement (continued)

Article 16 (continued)

Article 9 (continued)

Article 17

Article 18

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The meeting was called to order at 2.05 p.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued) (A/CN.9/371, A/CN.9/373, A/CN.9/375, A/CN.9/376 and Add.1 and 2, A/CN.9/377; A/CN.9/XXVI/CRP.2 and 3)

Consideration of draft Model Law on Procurement (continued)

Article 16 (continued)

1. Mr. HUNJA (Chairman of the Working Group), referring to one of the comments regarding paragraph (g) made by the representative of Italy at the end of the previous meeting, said that the draft Model Law was designed to provide only a framework for legislation; it had not been the Working Group's intention to establish detailed rules on how procurement should be carried out. It was expected that the procurement regulations of enacting States would make clear the practical implications of phrases such as "following public notice and adequate opportunity to comment".

2. Mr. JAMES (United Kingdom) said he would have no objection if the enacting State felt it appropriate that the authority issuing the approval provided for in the chapeau of article 16 should be the same as the authority issuing the approval required by paragraph (g). However, some enacting States might require approval pursuant to paragraph (g) to be given by a higher authority. The importance of that approval should be made clear in the Guide to Enactment, for without it the procuring entity would have a very convenient loophole.

3. In that connection, he wondered whether it might not be a good idea to include an obligation on the procuring entity to take account of any comments received in response to the public notice.

4. When considering article 29 (4) (c) (iii), the Commission would have to bear paragraph (g) of article 16 in mind.

5. Mr. BONELL (Italy) said that in the Italian legal system an expression like "adequate opportunity to comment" meant nothing and wondered whether the envisaged "public notice" would be sufficient to make potential foreign suppliers or contractors aware of the imminent procurement proceedings.

6. Mr. GRIFFITH (Observer for Australia) proposed that article 16 be split into two sections, the first dealing with the matters covered in paragraphs (a) to (f) and the second dealing with what the Commission was seeking to cover in paragraph (g). The wording of the second section might be on the following lines: "Provided that procurement from no other supplier or contractor is capable of promoting a policy specified in article 29 (4) (c) (iii), the procuring entity may engage in single-source procurement in accordance with article 27 so long as approval is obtained (from a high government authority) following public notice and adequate opportunity to comment." The importance attached to the "high government authority" could be stressed in a footnote or commentary.

7. Mr. LEVY (Canada) expressed support for the suggestion made by the observer for Australia.

8. The CHAIRMAN suggested that the Commission adopt the proposal made by the observer for Australia.

9. It was so decided.

Article 9 (continued)

10. The CHAIRMAN invited the Commission to return to its consideration of article 9 and drew attention to the proposals contained in documents A/CN.9/XXVI/CRP.2 and CRP.3.

11. Mr. WALLACE (United States of America), introducing the proposals contained in document A/CN.9/XXVI/CRP.2, said that his delegation could accept article 9 as it stood, subject to drafting changes by the Secretariat. It was important to enable procuring entities to embrace electronic data interchange (EDI) as it developed. However, he was well aware that some procuring entities would have difficulty in achieving with electronically conveyed communications the ends achieved with sealed written bids. The situation was simpler when the parties knew one another, but public procurement should, as envisaged in the Model Law, be open, so that all parties would usually not know one another.

12. He reiterated his view - expressed during the Commission's 498th meeting - that the Commission should request the Secretariat to prepare a paper on EDI as applied to procurement.

13. Mr. BONELL (Italy) said that, in his opinion, the time was not yet ripe for the Commission to take a stand for or against the use of EDI in procurement.

14. Ms. ZIMMERMAN (Canada), introducing the proposals contained in document A/CN.9/XXVI/CRP.3, said that the proposal relating to article 9 (1) was based on the assumption that the present wording of article 9 (1) permitted the use of EDI. The proposed amendment did not imply that EDI might be used by States in the near future; the intention was merely to provide for the availability of EDI as a means of communication in the procurement field.

15. With regard to the idea that the Commission should request the Secretariat to prepare a paper on EDI as applied to procurement, she felt that the issues which would be dealt with in such a paper were already being dealt with by the Working Group on Electronic Data Interchange, which had recently issued a report on its twenty-fifth session (document A/CN.9/373).

16. The view had been expressed that the Model Law was paper-based and therefore precluded the use of EDI. However, the Working Group was considering what requirements should be imposed in order to ensure that procurement by means of EDI met the same standards as a paper-based system. The purpose of her delegation's proposed amendment of article 25 (5) was to enable States and procuring entities to use EDI as soon as it satisfied those requirements.

17. Mr. JAMES (United Kingdom) said that, ideally, the Commission should await the recommendations of the Working Group on Electronic Data Interchange

(Mr. James, United Kingdom)

and adapt the Model Law to them. However, as the Commission wished to conclude its work on the Model Law during the current session, it should give serious consideration to the United States and Canadian proposals, which had considerable merit.

18. He suggested amending the Canadian proposal regarding article 25 (5) so that it read as follows: "A tender shall be submitted either in writing in a single sealed envelope or by any other means which provides at least a similar degree of authenticity, security and confidentiality."

19. He also suggested that in article 9 (1) the word "permanent" be inserted before "record of the content of the communication".

20. Mr. ANDERSEN (Denmark), expressing support for the Canadian proposal concerning article 9 (1), said he had misgivings about the proposal concerning article 25 (5) as many countries did not have the technical facilities for receiving and handling communications in electronic form.

21. Mr. FRIES (United States of America), noting that the use of EDI raised legal problems associated with the fact that the technical facilities in different States differed widely, said that the overriding goal should be to ensure that procurement proceedings remained open to all. The language of the Model Law should be neutral, but should encourage the development of EDI and of similar technologies. A Secretariat study on EDI as applied to procurement, in conjunction with the findings of the Working Group on Electronic Data Interchange, might point the way to a solution of the problems to which he had just referred.

22. Mr. BONELL (Italy) said that the Working Group had not yet even arrived at a satisfactory definition of "electronic data interchange" and that there were many difficulties associated with the use of EDI in procurement.

23. One major difficulty was that of ensuring that a tender submitted in electronic form was not "unsealed" by the procuring entity before it should be. Until that could be ensured, and various other difficulties resolved, EDI could not be regarded as a functional equivalent of writing.

24. Mr. PHUA (Singapore) said that the proposals now before the Commission would allow for the use of EDI in procurement. However, he urged caution in respect of the United Kingdom representative's suggestion for amending the Canadian proposal regarding article 25 (5) through the inclusion of a reference to "authenticity": according to the report on the work of its twenty-fifth session, the Working Group on Electronic Data Interchange had not yet reached agreement on the meaning of the term "authentication".

25. Mr. LEVY (Canada) said he was inclined to agree with the representative of the United Kingdom regarding the inclusion in article 25 (5) of a reference to "authenticity", but, as had just been pointed out, the Working Group had not yet defined the concept of "authentication". He therefore favoured provisional acceptance of the amendments suggested by the representative of

(Mr. Levy, Canada)

the United Kingdom subject to any advice the Secretariat might give on the question of authentication.

26. As to the suggested insertion of the word "permanent" in article 9 (1), thought needed to be given to the meaning of "permanence" in the context of procurement.

27. With regard to the difficulty of ensuring that a tender submitted in electronic form was not "unsealed" before it should be, he understood that computer programs could be time-controlled to prevent the premature "unsealing" of such tenders. However, further information and advice were needed on that point.

28. Mr. SORIEUL (Secretariat) said that the Working Group on Electronic Data Interchange, which had been endeavouring to define functional equivalents of written documents, signatures and so on in the EDI field, had considered the question of authentication (for example, certification of a document by a notary or authentication of the source of a message) but had not yet discussed the question of functional equivalents of the sealed envelope. For the purposes of the Model Law, he thought it would be enough simply to require the same degree of authenticity as that achieved with the sealed envelope in the case of written documents.

29. As for the question of "permanent" records, the Working Group was now tending to speak of "durable" records, in line with the legislation in certain countries.

30. Regarding the last point just mentioned by the representative of Canada, the computerized equivalent of the sealed envelope did indeed exist, but it was not yet being used widely.

31. With regard to the idea that the Secretariat be requested to prepare a paper on EDI as applied to procurement, the legal issues involved were not fundamentally different from those encountered in other fields. The technical issues were quite different, however, and it would probably be beyond the competence of the Secretariat and the Commission to demonstrate the technical viability of EDI for the purposes of the Model Law.

32. Mr. WALLACE (United States of America) said that he would for the time being go along with the proposals made by the representatives of Canada and the United Kingdom regarding article 25 (e), although he failed to understand why - in contrast to the proposals by the United States of America in document A/CN.9/XXVI/CRP.2 - they contained no explicit reference to EDI. One purpose of the United States proposals was to make it clear to Governments that they must address the EDI question before issuing procurement regulations. Moreover, the amended wording proposed by the United Kingdom representative appeared to impose the submission of tenders in electronic form even when they were not wanted.

33. With regard to the envisaged Secretariat paper on EDI as applied to procurement, it need not be very long and could be based on the deliberations of the Working Group on Electronic Data Interchange.

34. Mr. SOLIMAN (Egypt) said he preferred article 9 (1) as originally drafted.

35. Mr. MORAN BOVIO (Spain) said that, as just indicated by the representative of the United States of America, an advantage of the United States proposal was that it made clear what needed to be done by national legislators; it highlighted potential problems without proposing remedies, and its placement early in the Model Law meant that it would attract attention. He was therefore in favour of that proposal, but if it was withdrawn he would go along with the Canadian proposal.

36. Mr. JAMES (United Kingdom) said that, for him, the issue of authenticity was as important as that of confidentiality, and he would therefore not like the word "authenticity" to be dropped.

37. As to the question of permanence, he took the point made by the representative of Canada. He would be happy to accept the adjective "durable".

38. He hoped that some thought had been given by the Working Group on Electronic Data Interchange to the problems associated with the opening of tenders (the subject of article 28) when some tenders were on paper and some in electronic form.

39. Mr. GRIFFITH (Observer for Australia) said that one point which had arisen during the discussion but which had not yet been clarified was whether a procuring entity should be obliged to accept a tender in electronic form; he did not think that it should, and therefore suggested that, in the Canadian proposal as amended by the United Kingdom representative, the words "stipulated by the procuring entity" be added after the word "means".

40. Regarding the question of "permanent" records, he considered that article 9 (1) already provided for the requisite degree of permanence.

41. Mr. ANDERSEN (Denmark) and Mr. RAO (India) expressed support for the wording proposed by the observer for Australia.

42. Mr. JAMES (United Kingdom) expressed concern that the proposal by the observer for Australia might result in a situation where a procuring entity could exclude potential suppliers or contractors without access to EDI facilities. The procuring entity should be able to rule out tenders in electronic form but not tenders submitted on paper.

43. Mr. GRIFFITH (Observer for Australia) said that the matter could be clarified by the drafting group through a reference to article 9.

44. Mr. LEVY (Canada) said he believed that the additional words proposed by the observer for Australia would not affect the right of suppliers or contractors to submit tenders in writing.

45. Mr. WALLACE (United States of America) said that the Canadian proposal as amended by the United Kingdom representative and the observer for Australia was a good one but left certain matters open.

(Mr. Wallace, United States of America)

46. There was as yet no general enabling provision with regard to EDI, which was mentioned in the Guide to Enactment but not in the draft Model Law itself, where there was only a veiled reference to it in article 9. He thought it would be useful to draw the attention of legislators more explicitly to the EDI issue, in article 9 if necessary.

47. Within the context of the Commission's future work, possibly on the procurement of services, the Commission might perhaps request the Secretariat to prepare a 10-12 page paper on the broad subject of enabling legislation in the EDI field for the benefit of developed countries, developing countries and countries with economies in transition.

48. The CHAIRMAN took it that, for the time being, the Commission wished the first sentence of article 25 (5) to read as follows: "A tender shall be submitted either in writing in a single sealed envelope or by any other means stipulated by the procuring entity which provides at least a similar degree of authenticity, security and confidentiality." When the Commission reverted to article 25 (5), it would take up the Secretariat proposal contained in document A/CN.9/377.

49. It was so decided.

50. The CHAIRMAN suggested that, in the light of that decision, the Commission might wish to make a consequential amendment to article 9 (1).

51. Mr. SAHAYDACHNY (Secretariat) said that deletion of the words "other provisions of this Law or" in article 9 (1) might create the impression that the procuring entity could choose to accept only one form of communication. That would run counter to the spirit of article 25 (5) as just adopted and might raise doubts about the overriding nature of article 9 (3). Also, deletion of those words would raise the question of consistency within the Model Law.

52. Mr. LEVY (Canada) said that his delegation considered the words "other provisions of this Law or" to be superfluous. Also, the present wording of article 9 (1) suggested that a requirement of form specified by the procuring entity could override the Law. In his opinion, the question of consistency was less important.

53. Mr. PHUA (Singapore), referring to the title of article 9 ("Form of communications"), asked whether it was presupposed that the form contemplated in the Model Law would be consistent with the form which might be required in the domestic legislation of an enacting State.

54. Mr. JAMES (United Kingdom) said that the intention behind article 9 (1) was to permit communications in any form which provided a record of the content of the communication, subject to other provisions of the Law or any requirement of form specified by the procuring entity. Communications could always be in writing, the procuring entity being allowed to impose requirements as regards other forms of communication but not to refuse communications in writing. He had come to the conclusion that article 25 (5) as adopted was consistent with that.

55. Mr. LEVY (Canada) said that, if that was the general understanding, the text could be left to the drafting group.

56. It was so decided.

57. Mr. TUVAYANOND (Thailand) suggested that the United Kingdom representative's remarks might usefully be reflected in the Guide to Enactment.

58. Mr. WALLACE (United States of America), drawing attention to the Secretariat comment in document A/CN.9/377 regarding article 25 (5) that "Consideration may be given to adding a requirement that tenders must be signed or authenticated in some other manner", asked whether the Commission would be taking up that matter.

59. The CHAIRMAN replied that it would.

Article 17

60. Mr. SAHAYDACHNY (Secretariat) drew the Commission's attention to a typographical error in the list of articles, where "article 11 (2)" should read "article 18 (2)".

61. Ms. ZIMMERMAN (Canada) drew attention to the Canadian proposal in document A/CN.9/376/Add.1 to change "low amount or value" to "small quantity or low monetary value".

62. Mr. MORAN BOVIO (Spain) said that the layout of article 17 in the Spanish version of document A/CN.9/371 should be brought into line with that in the English version.

63. The CHAIRMAN said that he took it that the Commission wished to approve article 17 with the amendment proposed by Canada, which could still be examined by the drafting group.

64. It was so decided.

Article 18

65. Mr. PHUA (Singapore) said that the draft Guide to Enactment (document A/CN.9/375) seemed to presuppose the publication of invitations to tender or prequalify in paper-based media only. What about the use of EDI in that connection?

66. The CHAIRMAN said that the Secretary had taken note of the question.

67. Paragraph (1) was approved.

68. Mr. WALLACE (United States of America), referring to the Canadian Government's comment on article 18 (2) contained in document A/CN.9/376/Add.1, said that article 18 (2) illustrated the need for a study of the full implications of using EDI in procurement.

69. Mr. PARRA PEREZ (Observer for Venezuela) said that the requirement in article 18 (1) that invitations to tender or prequalify "be published in a language customarily used in international trade" and "in a newspaper of wide international circulation or in a relevant trade publication or technical journal of wide international circulation" could entail disproportionately high costs for many countries, particularly when small contracts were involved. In such a case, might it not be sufficient to publish the invitation in - say - a national newspaper that was known internationally?

70. The CHAIRMAN said that article 17 (b) would seem to cover the point raised by the observer for Venezuela.

71. Mr. TUVAYANOND (Thailand) said he could foresee difficulties in his country if invitations to tender or prequalify had, under national law, to be published in newspapers, trade publications or technical journals of wide international circulation. In Thailand, nationals of other countries had access to public notices through their embassies there, and foreign enterprises interested in supplying goods or services to the Thai administration simply needed to remain vigilant. That being the current practice, any attempt to require of the Thai administration that it spend considerable sums of money in order to facilitate access by foreigners to procurement proceedings in Thailand would not be well received by parliamentarians.

72. Mr. PEREZNIETO CASTRO (Mexico), noting that the phrase "or in a relevant trade publication or technical journal of wide international circulation" was missing from the Spanish version of article 18 (2), commended the remarks made by the representative of Thailand.

The meeting rose at 5 p.m.

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Twenty-sixth session

SUMMARY RECORD OF THE 502nd MEETING

Held at the Vienna International Centre, Vienna,
on Friday, 9 July 1993, at 9.30 a.m.

Chairman: Mr. MOHAMMED (Nigeria)

CONTENTS

New international economic order: procurement (continued)

Consideration of draft Model Law on Procurement (continued)

Article 18 (continued)

Article 19

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The meeting was called to order at 9.40 a.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued) (A/CN.9/371, A/CN.9/375, A/CN.9/376 and Add.1 and 2, A/CN.9/377, A/CN.9/378/Add.1)

Consideration of draft Model Law on Procurement (continued)

Article 18 (continued)

1. The CHAIRMAN, recalling the question raised at the end of the previous meeting by the observer for Venezuela and his own reply, said that the purpose of article 18 (2) was to promote transparency and foster competition, and in his view article 18 (2) should be retained as it stood.

2. In that connection, he recalled that in the draft Guide to Enactment (document A/CN.9/375) the Secretariat drew attention to the business edition of Development Business (published by the United Nations Department of Public Information and the United Nations University) as a possible publication medium.

3. Mr. ANDERSEN (Denmark) said that, if the principle of non-discrimination on the basis of nationality was to be upheld, article 18 (2) had to be retained as it stood, so that suppliers and contractors might have access to the necessary information.

4. Mr. JAMES (United Kingdom), agreeing with the Chairman and the representative of Denmark, said that, in his view, the concern of the observer for Venezuela that tendering for small contracts should not be unduly expensive was met in article 17.

5. Mr. WALLACE (United States of America), supporting that view, said it was important for procuring entities to avoid a narrow, nationalistic approach and to think in terms of their obligation to the taxpayer to ensure the most effective competition possible.

6. Mr. TUVAYANOND (Thailand) said that the point at issue - which had originally been raised by him - was not discrimination on the basis of nationality.

7. In his view, the nationwide dissemination of an invitation to tender in a language customarily used in international trade should suffice. Most countries were represented abroad by embassies or consulates, which had access to the national newspapers and journals of the countries where they were located and should be on the alert for any business opportunities - for example, in the field of road or railway construction - that might arise.

8. He himself would find it difficult to persuade his Government that it should go to the trouble of publishing invitations to tender or prequalify in international newspapers or journals. It was not a matter of whether such a procedure was expensive, but of whether it was necessary.

9. Mr. AZZIMAN (Morocco) shared that view. The procuring entity should be given the option of using the national press, resorting to international publications only when appropriate.

/...

(Mr. Azziman, Morocco)

10. He wondered whether the envisaged system might not have the indirect effect of disadvantaging national firms which did not have access to international publications and might thus not receive the required information in time.

11. Mr. ANDERSEN (Denmark) said, besides large companies tendering for major projects, one had to think of small companies engaged in what was known as "niche production" - i.e. making various highly technical items for which there was demand all over the world. Such companies could not reasonably be expected to follow the demand for their products if procuring entities did not use newspapers and journals of wide international circulation, and neither could their Governments.

12. There had to be a proper balance between the burden on the procuring entity and the burden on the tenderer, and he felt that the draft Model Law struck it.

13. Mr. KLEIN (Observer for the Inter-American Development Bank) endorsed the views expressed by the representative of Denmark.

14. Mr. PEREZNIETO CASTRO (Mexico) said that, in his opinion, the responsibility for disseminating information should lie with the potential supplier or contractor and not with the procuring entity.

15. Mr. TUVAYANOND (Thailand) shared that opinion; his Government had had to spend money it could ill afford sending representatives to other countries in order to find suppliers and contractors capable of meeting its needs. Businessmen should make the effort to find out what demand for their products existed, using their embassies and consulates, which had ready access to the necessary information.

16. He proposed that the words "of wide international circulation" be deleted where they occurred in article 18 (2).

17. Mr. MORAN BOVIO (Spain) said that businessmen, on learning about an invitation to tender, should also make use of the embassies and consulates representing the country of the procuring entity that issued the invitation.

18. Mr. WALLACE (United States of America), noting that a Government could always opt for domestic procurement, said that, if a particular legislature, such as that of Thailand, wished not to enact article 18 (2), it was free to do so. The Commission's report should reflect the fact that there were Governments which did not wish to enact it.

19. Mr. PARRA PEREZ (Observer for Venezuela) said that in many developing countries, in an effort to prevent corruption, great efforts were being made to change the way public works contracts were handled; there was now sometimes a legal requirement for international tendering even in the case of very small projects. The cost of complying with article 18 (2), however, might jeopardize such efforts.

20. Mr. JAMES (United Kingdom), responding to one of the points made by the representative of Thailand, said that no countries had embassies or consulates in all other countries. In any case, the main function of trade representatives at diplomatic and consular missions was not to disseminate information about public procurement, but to advise and assist companies engaged in negotiations. Moreover, the publication of invitations to tender or prequalify in international newspapers or journals produced a better response.

21. Mr. HAINZL (Austria) said that, given the importance of international procurement in promoting international trade, an objective referred to in preambular paragraph (b), he believed that article 18 (2) should be retained as it stood.

22. Mr. KOMAROV (Russian Federation) said that, although preambular paragraph (b) spoke of "promoting international trade", preambular paragraph (a) spoke of "maximizing economy and efficiency in procurement". In his view, it should be left to the procuring entity to decide on the most economic and efficient method of procurement - and therefore on whether to apply article 18 (2).

23. Mr. PRIESTLEY (Observer for Australia) suggested that reference be made in the Model Law to the business edition of Development Business. If that publication became established as the recognized medium for invitations to tender or prequalify, publication costs would be minimized. If such a reference was considered excessive, one might make a more positive statement in the Guide to Enactment about using that publication.

24. The CHAIRMAN said he sensed that there was a consensus in the Commission for retaining article 18 (2) unchanged. It had been sufficiently explained that States, including developing countries, would elicit more competitive tenders by widely publicizing their invitations to tender or prequalify in international publications. Also, the Guide to Enactment might stress the value of using the business edition of Development Business.

25. In the absence of any objections, he took it that the Commission wished to adopt article 18 (2) as submitted by the Working Group in the annex to document A/CN.9/371.

26. It was so decided.

27. The CHAIRMAN, inviting the Commission to consider article 18 (3), which dealt with procedures for soliciting tenders or applications to prequalify on a restricted basis (so-called "restricted tendering"), said that it provided for three safeguards: the requirement that the number of suppliers or contractors selected should be sufficient; the requirement that the grounds and circumstances for soliciting on a restricted basis should be recorded in the record of the procurement proceeding; and the need to seek approval.

28. Mr. KLEIN (Observer for the Inter-American Development Bank) said that article 18 (3) provided for a procurement method which, although an exception to the general rule, was commonly employed in Latin America. In his view, it should therefore be moved to chapter II.

(Mr. Klein, Observer for the Inter-American Development Bank)

29. Also, he felt that the reasons justifying use of the method ("reasons of economy and efficiency") were open to abuse; something less broad and vague was necessary.

30. Mr. UEMURA (Japan), noting that article 18 (3) spoke of the procuring entity "sending invitations to tender or invitations to prequalify ... only to particular suppliers or contractors selected by it", suggested that, in the interests of transparency, the procurement entity should be required to issue a prior public announcement that it was sending invitations to selected suppliers or contractors. That would be in accordance with paragraph (4) of article 5 of the GATT agreement on government procurement.

31. Mr. PEREZNIETO CASTRO (Mexico) agreed with the observer for the Inter-American Development Bank that article 18 (3) should be moved to chapter II.

32. With regard to the question of transparency, he was not convinced that prior public announcement as envisaged by the representative of Japan would be appropriate to restricted tendering, but he did believe that, in order to minimize the possibility of abuse, the subsequent publication of information on the proceedings was very desirable.

33. Mr. GRIFFITH (Observer for Australia) agreed with the observer for the Inter-American Development Bank that the formulation "reasons of economy and efficiency" was very weak and proposed the insertion of a reference to "exceptional and particular circumstances" and - as agreed at the previous meeting in connection with article 16 - a reference to the need for approval by high government authority.

34. Mr. AZZIMAN (Morocco), supporting the placing of article 18 (3) in chapter II, proposed that the procuring entity be required to state in advance its criteria for the selection of suppliers or contractors to be invited to submit tenders or applications to prequalify and that, following the award of the contract, it be required to record the reasons for its choice of supplier or contractor.

35. Mr. TUVAYANOND (Thailand) said that chapter II would be a more appropriate place for article 18 (3) and that the proposal made by the observer for Australia was a useful one. Also, it would be helpful if the record of the exceptional proceedings provided for in article 18 (3) was accessible to the public.

36. Mr. PARRA PEREZ (Observer for Venezuela) said that in some countries where restricted tendering was practised there was no possibility of challenging the procuring entity's selection of suppliers or contractors to be invited to submit tenders or applications to prequalify as there was no provision for cancelling the selection. It was therefore necessary to be very precise about the conditions under which restricted tendering would be permitted.

37. Mr. HUNJA (Chairman of the Working Group) said that, before deciding that article 18 (3) should be moved to chapter II, the Commission should bear in mind that moving it there would in effect add a further method of procurement to those already referred to in that chapter.

38. Regarding the view that the formulation "for reasons of economy and efficiency" was very weak, in an earlier draft of the Model Law the Secretariat had proposed (on page 17 of the English version of document A/CN.9/WG.V/WP.28) a wording that set out in detail the circumstances under which restricted tendering might be resorted to. The Working Group had decided, however, that the proposed wording was too detailed and had agreed to adopt the formulation now under discussion. Clarification of the circumstances under which the procurement entity would be permitted to resort to restricted tendering might be worthwhile if the Commission felt that the present formulation was open to abuse, but members should perhaps first refer to documents A/CN.9/WG.V/WP.28 and A/CN.9/343 so as to ascertain the position of the Working Group on that question.

39. Mr. JAMES (United Kingdom) said that the words "economy and efficiency" referred back to "economy and efficiency in procurement" in paragraph (a) of the preamble. If those words were retained, perhaps "in procurement" should be added.

40. Regarding the proposal made by the observer for Australia, he suggested that the reference to "exceptional and particular circumstances" also be added, so that the phrase in question read: "..., when in exceptional and particular circumstances it is necessary for reasons of economy and efficiency in procurement". As to the reference to the need for approval by a high government authority, he questioned whether restricted tendering was such an undesirable procurement method that such approval was necessary.

41. He did not think that article 18 (3) should be moved to chapter II. Perhaps the point raised by the observer for the Inter-American Development Bank could be addressed by stressing in the Guide to Enactment that article 18 (3) provided for a procedure which was less desirable than open tendering but which might in some circumstances be appropriate.

42. Mr. MORAN BOVIO (Spain) suggested that the various proposals made during the discussion be set forth clearly in a conference room paper, as a basis for further discussion.

43. Mr. WALLACE (United States of America) agreed with the observer for Australia on the desirability of including an approval requirement and making the criteria for recourse to restricted tendering more rigorous.

44. As to the question of moving article 18 (3) to chapter II, on the grounds that restricted tendering was a procedure of which the Commission basically disapproved, relocation might simply result in the procedure's enjoying greater prominence. If article 18 (3) was going to be moved to chapter II, perhaps the best place for it would be at the end of the chapter - as a new article 17. Alternatively, it could be kept in chapter III, as a new article 18 immediately before the present article 18. The essential point was that restricted tendering was abused in some parts of the world, and camouflaging the procedure would not help to curb the abuse.

45. Mr. AL-NASSER (Saudi Arabia) said he failed to see how greater economy and efficiency could be achieved by restricting the number of suppliers or contractors invited to submit tenders or applications to prequalify.

46. Mr. KLEIN (Observer for the Inter-American Development Bank), reiterating his view that article 18 (3) should be moved to chapter II, said that that chapter provided for procurement methods of which some (such as competitive negotiation and two-stage tendering) were unknown in Latin America, whereas the provision for restricted tendering - a procurement method widely employed in Latin America - was hidden away in a chapter on tendering procedures.

47. With regard to the words "reasons of economy and efficiency", something even more explicit than what had been proposed during the discussion was necessary. The Guide to Enactment contained a very full enumeration of the circumstances that could trigger recourse to restricted tendering, and the Model Law itself should be equally explicit.

48. Mr. LEVY (Canada) said that he could see no point in moving article 18 (3) to chapter II and that he was in favour of the United Kingdom representative's suggestion regarding the combining of a reference to "exceptional and particular circumstances" with the reference to "reasons of economy and efficiency in procurement". The reference to the need for approval by a high government authority should perhaps be placed in parentheses.

49. Ms. PIAGGI-VANOSSI (Argentina), supporting the idea of moving article 18 (3) to chapter II, emphasized the importance of a rigorous approach to restricted tendering. With regard to the last sentence of article 18 (3), in the interests of transparency the record of the procurement proceedings should state what benefits in terms of economy and efficiency had been achieved by resorting to that procedure.

50. Mr. RAO (India), noting that restricted tendering was sometimes resorted to in India, suggested that article 18 (3) be moved to chapter II and that the wording suggested by the representative of the United Kingdom be adopted.

51. The CHAIRMAN asked whether the Commission could agree that the paragraph under discussion become a new article, 18 bis, with the wording suggested by the representative of the United Kingdom and - in parentheses - the reference to approval by a high government authority.

52. Mr. GRIFFITH (Observer for Australia) felt that the phrase "when necessary for reasons of economy and efficiency" and the words "in exceptional and particular circumstances" should not be combined as suggested by the representative of the United Kingdom.

53. Mr. WALLACE (United States of America) suggested that the new article be numbered 17 bis.

54. Mr. MORAN BOVIO (Spain) said that most speakers had seemed to be in favour of moving article 18 (3) to chapter II.

55. Mr. PEREZNIETO CASTRO (Mexico), expressing support for the first point just made by the observer for the Inter-American Development Bank, said he continued to believe that article 18 (3) should be moved to chapter II. At the same time, he felt that additional safeguards were necessary in order to ensure that restricted tendering was not abused.

56. Mr. AZZIMAN (Morocco) said that the paragraph dealing with restricted tendering should logically appear with the paragraphs dealing with other procurement methods that constituted exceptions to the rule of 100 per cent open tendering. It was true that some reservations had been expressed about moving article 18 (3) to chapter II, but they had not struck him as being very strong.

57. Moving article 18 (3) to chapter II would no doubt somewhat disturb the present structure of the Model Law, which would have to be adjusted, but that was not an insurmountable task; an informal group set up by the Chairman could tackle it.

58. Mr. PARRA PEREZ (Observer for Venezuela), supporting the statements just made by the representatives of Morocco and Mexico, said that the important point was not where the provisions contained in article 18 (3) finally appeared in the Model Law but how to ensure that the Model Law provided for restricted tendering, which was a useful intermediate between 100 per cent open tendering and direct purchasing, and to ensure that the procedure was not abused.

59. Ms. CRISTEA (Observer for Romania) said that, if article 18 (3) meant that foreign suppliers and contractors were excluded from restricted tendering, it might as well be incorporated into article 17. If foreign suppliers and contractors were not excluded, it ought perhaps to be incorporated into article 16, for only a very few suppliers or contractors were likely to be able to penetrate the market in question when restricted tendering was being practised. At all events, restricted tendering should not appear as a separate procurement method as it might thereby become the norm in the case of some countries.

60. Mr. KOMAROV (Russian Federation) said that the risk of restricted tendering becoming the norm could to some extent be reduced by placing the procuring entity under more rigid controls. That might be achieved by deleting from article 38 the subparagraph - subparagraph 2 (c) - which exempted from review the limitation of solicitation of tenders on the ground of economy and efficiency pursuant to article 18 (3).

61. The CHAIRMAN proposed that the discussion be suspended and requested concerned delegations to meet with him later in order to see how the problems associated with article 18 (3) might be resolved.

Article 19

62. Mr. SAHAYDACHNY (Secretariat), referring to document A/CN.9/377, said that the reference to article 8 (1) (a) in article 19 (1) (d) was a typographical error; the reference should be to article 6 (2).

(Mr. Sahaydachny, Secretariat)

63. With regard to the change in article 19 (2) which the Secretariat was proposing, he said that the procuring entity might sometimes already have decided on "the place and deadline for the submission of tenders" (mentioned in subparagraph (j) of article 19 (1)) at the time when it was issuing the invitation to prequalify. If the change proposed in document A/CN.9/377 was adopted, a corresponding change would have to be made in the provisions concerning prequalification documents.

The meeting rose at 12.30 p.m.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-sixth session

SUMMARY RECORD OF THE 503rd MEETING

Held at the Vienna International Centre, Vienna,
on Friday, 9 July 1993, at 2 p.m.

Chairman: Mr. MOHAMMED (Nigeria)

CONTENTS

New international economic order: procurement (continued)

Consideration of draft Model Law on Procurement (continued)

Article 19 (continued)

Article 20

Article 21

Article 22

Article 23

Article 24

Article 25

This record is subject to correction.

Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent within one week of the date of distribution of this document to the Secretary of the Commission, room E0455, Vienna International Centre.

Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

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Distr.: 23 July 1993

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The meeting was called to order at 2.05 p.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued) (A/CN.9/371, A/CN.9/375, A/CN.9/376 and Add.1 and 2, A/CN.9/377; A/CN.9/XXVI/CRP.1-4)

Consideration of draft Model Law on Procurement (continued)

Article 19 (continued)

1. Mr. PEREZNIETO CASTRO (Mexico) suggested that in subparagraph (1) (c) the word "supply" be replaced by "delivery".

2. Ms. ZIMMERMAN (Canada), noting that subparagraph (1) (c) contained no reference to the place of delivery of the goods, felt that might be a relevant consideration.

3. Mr. AZZIMAN (Morocco) suggested that the chapeau of paragraph (2) be reworded to read: "An invitation to prequalify shall contain the information referred to in subparagraphs (a), (b), (c), (d), (e), (g) and (h) of paragraph (1), as well as the following information".

4. The CHAIRMAN, noting that the various drafting suggestions would be considered by the drafting group, took it that the Commission wished to adopt article 19.

5. It was so decided.

Article 20

6. Mr. SAHAYDACHNY (Secretariat), drawing attention to the Secretariat proposals in document A/CN.9/377 for amending article 20, said that prequalification documents were not likely to be involved when a procuring entity was using a procurement method other than tendering proceedings.

7. Mr. PRIESTLEY (Observer for Australia) said that, if the price charged by the procuring entity was intended to enable it to recover its costs, perhaps the word "producing" would be better than "printing" in the last sentence.

8. The CHAIRMAN, referring to the commentary on article 20 in document A/CN.9/375, said he took it that the Commission wished to adopt article 20.

9. It was so decided.

Article 21

10. Mr. GRIFFITH (Observer for Australia) noted that in the chapeau of article 21, the words "at a minimum" were used, whereas in the chapeau of article 19 the corresponding expression was "at least". For the sake of consistency, the same wording should be used in both articles.

11. The CHAIRMAN said the drafting group would ensure consistency, the words "at a minimum" being used throughout the text.

12. Mr. WALLACE (United States of America) felt that the Secretariat's proposal (in document A/CN.9/377) that the word "principal" be inserted before "terms and conditions of the procurement contract" in paragraph (f) was unwise.

13. As to paragraph (g), he suggested that the words "evaluated and compared" in the additional phrase which the Secretariat was proposing might be replaced by "handled".

14. Mr. LEVY (Canada) agreed with both the points made by the United States representative.

15. Mr. GRIFFITH (Observer for Australia) thought the proposal to add the word "principal" was a reasonable one; it would often be impossible to spell out all the terms and conditions of the contract. If "principal" was added, paragraph (f) should end at the words "the procuring entity".

16. Mr. PHUA (Singapore) wondered whether it would be enough if only the "principal" terms and conditions of the contract were provided in the solicitation documents.

17. Mr. PEREZNIETO CASTRO (Mexico) said he was not in favour of the amendments proposed by the Secretariat.

18. In the Spanish version of paragraph (f), the word escritura should be replaced by a word such as forma or texto.

19. The CHAIRMAN, suggesting that the point regarding the Spanish text be referred to the drafting group, took it that the Commission wished to adopt paragraph (f) without the proposed addition of "principal" and to adopt paragraph (g) with the additional phrase proposed by the Secretariat in document A/CN.9/377, subject to review by the drafting group.

20. It was so decided.

21. Mr. AZZIMAN (Morocco), commenting on the reference in paragraph (n) to "a statement whether the procuring entity intends to convene a meeting of suppliers and contractors", said that normally it would not be known in advance whether such a meeting would be required.

22. The provision in paragraph (s) that the omission of one of the envisaged references should not constitute grounds for review or give rise to liability on the part of the procuring entity was the only provision of its kind in the Model Law. It would therefore be better placed at the end of article 21.

23. Mr. SAHAYDACHNY (Secretariat) said, with regard to the point made by the representative of Morocco about paragraph (n), that, if the procuring entity did not know whether it intended to convene a meeting of suppliers and contractors, the envisaged statement could obviously not be included in the solicitation document. The non-inclusion of such a statement, however, would not preclude the procuring entity from deciding to convene a meeting.

24. Mr. JAMES (United Kingdom) said that, as liability was a separate issue, paragraph (s) should perhaps be separated from the rest of the article.

25. The CHAIRMAN suggested that the Commission adopt article 21 with paragraph (s) moved to the end.

26. It was so decided.

Article 22

27. Mr. SAHAYDACHNY (Secretariat), referring to the Secretariat proposal in document A/CN.9/377 that article 22 be moved to chapter I, said that in the Secretariat's opinion that would help to ensure the widest possible competition.

28. The CHAIRMAN suggested that the question of moving article 22 to chapter I be considered before the actual content of the article.

29. Mr. LEVY (Canada) said that, although the Secretariat proposal was an interesting one, he was not sure how article 22 would apply to requests for proposals or competitive negotiation - or to any other procurement method which the procuring entity might employ because it was unable to specify exactly what it wanted.

30. Mr. JAMES (United Kingdom) said that article 22 was unlikely to be helpful in the context of requests for proposals or competitive negotiation, but in the context of procurement methods such as requests for quotations (or even single-source procurement) it might be of some use, although the cases in question might count for only about 1 per cent of the total. If the article was to be moved, the wording would have to be made more neutral, so that it applied to - for example - requests for quotations.

31. Ms. ZIMMERMAN (Canada) agreed that the wording of article 22 would have to become more neutral if the article was moved to chapter I.

32. Mr. WALLACE (United States of America), expressing himself in favour of the Secretariat proposal, said that article 22 should be redrafted so as to make the underlying principles stand out more clearly.

33. Mr. LEVY (Canada) said that, if article 22 was to be redrafted in such a way that it covered procurement methods such as requests for proposals and competitive negotiation, he would have to withhold his approval until he had seen the text produced by the drafting group. The envisaged relocation would be acceptable only if no damage was done to chapter I.

34. Mr. WALLACE (United States of America) felt that the issue was basically one of drafting; if moved, article 22 would have to be made more flexible.

35. Mr. MORAN BOVIO (Spain) said that, before transmitting article 22 to the drafting group, the Commission should be fully agreed on its substance.

36. Mr. GRUSSMANN (Austria) said that, if article 22 was moved to chapter I, reference to it should be in chapter IV where appropriate.

37. Mr. WALLACE (United States of America) suggested that the article start with the chapeau "To the extent and where applicable".

38. The CHAIRMAN took it that the Commission wished article 22 to be moved to chapter I and that it wished the drafting group to examine the wording of the article in the light of its discussion.

39. It was so decided.

40. The CHAIRMAN, inviting comments on the substance of article 22, drew attention to the Secretariat proposal that the words "Standardized trade terms shall be used" be replaced by the words "Due regard shall be had for the use of standardized trade terms" in subparagraph (3) (b).

41. Mr. JAMES (United Kingdom), expressing support for the proposed amendment, said that in his view a similar amendment would have been appropriate in subparagraph (3) (a). However, his concern had been met by the United States representative's proposal for a chapeau.

42. The CHAIRMAN took it that the Commission wished to adopt article 22 as amended.

43. It was so decided.

Article 23

44. Ms. PIAGGI-VANOSSI (Argentina) suggested that provisions like those in article 23 also be formulated in respect of the envisaged contract, which suppliers and contractors should be able to challenge before its conclusion.

45. Mr. MORAN BOVIO (Spain) said that, in his view, the proposal made by the representative of Argentina related to matters that went beyond what the Model Law was intended to achieve.

46. Mr. WALLACE (United States of America), expressing agreement with the representative of Spain, said he understood the representative of Argentina to have been referring to a situation where the contract was defective. A procuring entity that drafted defective contracts was bad at its job, but that was a political problem that could not be solved through the Model Law. In paragraphs 9 and 10 of the Introduction to the Guide to Enactment (document A/CN.9/375), the Model Law was described as a "framework" law, in which the answers to certain legal questions might not necessarily be found; it was stated there that answers were more likely to be found in other bodies of law, such as the applicable administrative, contract, criminal and judicial procedure law.

47. Ms. PIAGGI-VANOSSI (Argentina) said that, in her view, if the contract contained a serious error or omission, it ought to be possible to rectify the matter, all tenderers being informed of what was being done. That having been said, however, she would withdraw her proposal if the Commission considered it inappropriate.

48. Mr. WALLACE (United States of America), referring to the possibility of redress under the terms of article 38 (1), said that anything more would go beyond the scope of procurement law.

49. The CHAIRMAN said that the point raised by the representative of Argentina could be addressed during the discussion of chapter V - Review.

50. Ms. PIAGGI-VANOSSI (Argentina) said she was not referring to possible redress, but to preventive measures before the procurement contract was concluded. In her view, article 23 should refer to the contract as well as to solicitation documents.

51. Mr. SAHAYDACHNY (Secretariat) said that, in the understanding of the Secretariat, clarification or modification of the contract at an early stage of the procurement proceedings was provided for by article 21 (f) taken in conjunction with article 23; the contract was one of the solicitation documents, with the result that it was subject to the envisaged clarification or modification procedure.

52. Ms. PIAGGI-VANOSSI (Argentina) said that clarification or modification of the contract in the manner envisaged would be possible only if the terms and conditions of the contract were known at an early stage.

53. The CHAIRMAN took it that the Commission wished to adopt article 23.

54. It was so decided.

Article 24

55. Article 24 was adopted.

Article 25

56. Mr. PRIESTLEY (Observer for Australia) suggested that a location for the submission of tenders should be specified in paragraph (1).

57. Mr. LEVY (Canada), supporting that suggestion, proposed that the paragraph read "The procuring entity shall fix a specific date and time as the deadline and the location for the submission of tenders."

58. It was so decided.

59. Mr. TUVAYANOND (Thailand), having suggested that "suppliers and contractors" in paragraph (2) should perhaps read "suppliers or contractors", said that he could not understand why a deadline extension should be required following a meeting of suppliers or contractors.

60. Mr. SAHAYDACHNY (Secretariat), having agreed that "suppliers or contractors" would probably be more correct, said that the purpose of the envisaged meeting would be to clarify the solicitation documents, the information provided at the meeting being deemed essential for the preparation of tenders. The Working Group had therefore considered it necessary, when minutes of the meeting were issued, to allow time for them to be taken into account.

61. Mr. TUVAYANOND (Thailand) asked who would organize such meetings.

62. Mr. SAHAYDACHNY (Secretariat) drew attention to article 23 (3), which suggested that the procuring entity was responsible for convening such meetings and for preparing the minutes.

63. Mr. AL-NASSER (Saudi Arabia) asked whether an indication could not be given of the period by which the deadline for the submission of tenders might be extended.

64. Mr. SAHAYDACHNY (Secretariat) replied that the Working Group had felt that it would be inappropriate for the Model Law to establish deadlines for the submission of tenders; so it would also be inappropriate for the Model Law to indicate how far such deadlines might be extended. Such matters were best left to the enacting State and its procurement regulations.

65. The CHAIRMAN said he took it that the Commission wished to adopt paragraph (2) with the words "suppliers and contractors" amended to "suppliers or contractors" [where they first occurred] [at both places where they occurred].

66. It was so decided.

67. Mr. TUVAYANOND (Thailand) felt that in paragraph (3) it was going too far to provide for a deadline extension "due to any circumstance" beyond the control of suppliers or contractors.

68. The CHAIRMAN said that, as indicated in the draft Guide to Enactment (document A/CN.9/375), paragraph (3) was permissive.

69. Mr. AL-NASSER (Saudi Arabia) suggested that if, following a deadline extension, the number of suppliers or contractors submitting tenders was considerably lower than the number invited to do so, it should be possible for the deadline to be extended further.

70. Mr. PHUA (Singapore) asked whether, if the procuring entity decided to exercise its discretion and not extend the deadline, its decision would be open to judicial review.

71. Mr. LEVY (Canada) said that, although the word "may" was generally regarded as permissive, it was not impossible under common law that a procuring entity relying on the wording of paragraph (3) as it stood would find itself subject to judicial review on grounds that the provision in question was mandatory. The wording should therefore be tightened up, perhaps through insertion of the words "at its sole discretion" after "may".

72. Mr. WALLACE (United States of America) suggested a form of words such as "The procuring entity may, at its discretion and if, in its judgment, it believes that its convenience is served ...".

73. Mr. PHUA (Singapore) wondered whether the procuring entity could not be protected through a suitable addition to article 38 (2).

74. Mr. TUVAYANOND (Thailand) supported the proposal made by the representative of Canada.

(Mr. Tuvayanond, Thailand)

75. In response to the question asked by the representative of Singapore, he said that judicial review was foreseen for cases such as breach of duty and bad faith on the part of the procuring entity. Use of the word "may" in paragraph (3) suggested that a supplier or contractor would not be able to challenge the decision of a procuring entity not to extend the deadline.

76. Mr. JAMES (United Kingdom) said that chapter V - Review - dealt with failure on the part of the procuring entity to comply with duties. As he recollected, however, the Working Group had intended "may" in paragraph (3) of article 25 to be discretionary. Nevertheless, he had no objection to the proposal made by the representative of Canada.

77. With regard to the words "in its judgement" suggested by the representative of the United States of America, he felt that they might make the kind of judicial review found in the United Kingdom and in most other common law jurisdictions more likely - on the grounds of unreasonable exercise of judgement.

78. Mr. PRIESTLEY (Observer for Australia) supported the proposal made by the Canadian representative but suggested replacement of the word "sole" by "absolute"; in most common law jurisdictions the expression "absolute discretion" went as far as was possible in trying to exclude judicial review.

79. The CHAIRMAN asked whether the Commission could accept the text of paragraph (3) with the insertion of the words "at its absolute discretion" before "may".

80. It was so decided.

81. The CHAIRMAN asked the Commission whether it could accept paragraph (4) as drafted.

82. It was so decided.

83. The CHAIRMAN recalled that, at its 501st meeting, the Commission had tentatively agreed that the first sentence of paragraph (5) should read "A tender shall be submitted either in writing in a single sealed envelope or by any other means stipulated by the procuring entity which provides at least a similar degree of authenticity, security and confidentiality". Also, he drew attention to the Secretariat proposal contained in document A/CN.9/377.

84. Mr. AL-NASSER (Saudi Arabia) suggested the addition of a phrase on the lines of ", including an envelope issued directly by a computer," after "single sealed envelope".

85. Mr. JAMES (United Kingdom), supporting the Secretariat proposal, said it was necessary to ensure the highest degree of authentication of tenders. There was therefore a strong case for requiring that a tender be signed by a director or other officer of the company submitting it.

86. Ms. ZIMMERMAN (Canada) said that, although her delegation would not object to the addition of a requirement that tenders must be signed or authenticated in some other manner, it would have difficulty if the authentication procedure was spelled out in the kind of detail appropriate in corporate law.

87. Mr. ANDERSEN (Denmark) said that, in his view, the real issue was whether an offer was binding on the party submitting it; that would depend on the legal system in question. The Model Law should simply make it clear that, in order to be accepted by the procuring entity, the offer must be binding, and there should be no attempt to specify what made an offer binding.

88. Mr. HAINZL (Austria), endorsing the statement made by the representative of Denmark, said that the point at issue was one best dealt with in the relevant civil laws of enacting States rather than in the Model Law.

89. Mr. TUVAYANOND (Thailand) wondered whether fax communication was regarded as a form of electronic data interchange (EDI). If it was, problems might arise in his country, where the courts had ruled that a fax did not constitute proof as it could easily be falsified.

90. He also wondered whether suppliers or contractors submitting tenders in electronic form might not be subject to less stringent document legalization requirements than those submitting written tenders.

91. Mr. WALLACE (United States of America) said that in most cases the procuring entity required that tenders be signed. Paragraph (5) should therefore provide for the signing of tenders.

92. Mr. ANDERSEN (Denmark) said that, in his view, it was unreasonable to insist that the person responsible for the submission of a tender should actually sign the tender when there was no doubt that that person was bound by it; in such a case, the signature requirement was a very formalistic one.

93. Mr. PEREZNIETO CASTRO (Mexico) expressed support for the views expressed by the representatives of Denmark and Austria.

94. Mr. AL-NASSER (Saudi Arabia) said that in his country there was a trend towards the acceptance of computer-generated signatures.

95. The CHAIRMAN asked the Commission whether it could accept - subject to editing by the drafting group - the following wording for the first sentence of paragraph (5): "A tender shall be submitted, signed, either in writing in a single sealed envelope or by any other means [stipulated by the procuring entity] which provides at least a similar degree of authenticity, security and confidentiality."

96. It was so decided.

97. The CHAIRMAN asked the Commission whether it could accept paragraph (6) as drafted.

98. It was so decided.

The meeting rose at 5.05 p.m.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-sixth session

SUMMARY RECORD OF THE 504th MEETING

Held at the Vienna International Centre, Vienna,
on Monday, 12 July 1993, at 9.30 a.m.

Chairman: Mr. MORAN BOVIO (Spain)
later: Mr. MOHAMMED (Nigeria)

CONTENTS

New international economic order: procurement (continued)

Consideration of draft Model Law on Procurement (continued)

Article 26

Article 27

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Distr.: 23 July 1993

The meeting was called to order at 9.45 a.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued) (A/CN.9/371, A/CN.9/375, A/CN.9/376 and Add.1 and 2, A/CN.9/377, A/CN.9/378 and Add.1)

Consideration of draft Model Law on Procurement (continued)

Article 26

1. Mr. LEVY (Canada) suggested that in paragraph (1) "in effect" be replaced by "open for acceptance".

2. Mr. TUVAYANOND (Thailand) supported the suggestion.

3. Mr. WALLACE (United States of America) said that, although he had no strong feelings about the suggestion, the words "in effect" had a certain legal ring about them which "open for acceptance" lacked.

4. Mr. PHUA (Singapore) supported the suggestion and said he would support a similar amendment to article 21 (o).

5. The CHAIRMAN said he took it that the Commission wished to adopt paragraph (1) with the change suggested by the representative of Canada.

6. It was so decided.

7. The CHAIRMAN drew the Commission's attention to the Secretariat proposal in document A/CN.9/377 for amending subparagraph (2) (b) through deletion of the words "if it is not possible to do so".

8. Mr. TUVAYANOND (Thailand) said that the reference to "effectiveness" of tenders raised the problem of consistency with paragraph (1). He wondered whether the change in paragraph (1) should be reconsidered.

9. Mr. LEVY (Canada) suggested that the drafting group deal with the matter. He had no particularly strong feelings about the change.

10. The CHAIRMAN, noting that the matter would be referred to the drafting group, said he took it that the Commission wished to adopt paragraph (2) without the words "if it is not possible to do so".

11. It was so decided.

12. Mr. LEVY (Canada), drawing attention to document A/CN.9/376/Add.1, said that, as drafted, the first sentence of paragraph (3) was contrary to the law and contracting practices in Canada and some other countries with common law jurisdictions. In Canada, in the absence of other specific terms and conditions, a contract automatically arose upon the submission of a tender in response to an invitation. The leading case, which had been heard in the Supreme Court of Canada in 1981, was "Her Majesty the Queen in right of Ontario and the Water Resources Commission v. Ron Engineering and Construction (Eastern) Limited". The tenderer had discovered a mistake in the tender which would cost millions of dollars and had tried to withdraw the tender, although the solicitation documents had contained no provision for withdrawal. The

(Mr. Levy, Canada)

Supreme Court had found against the tenderer. In a subsequent case, "North-East Marine Services Limited v. Atlantic Pilotage Authority", the Federal Court had stated that the law on tendering had changed with the decision of the Supreme Court.

13. He said that paragraph (3) would change the present situation in a way which many procuring entities, suppliers and contractors would find disruptive and confusing, at least in Canada, and pointed out in that connection that the Government of Japan had indicated in document A/CN.9/376/Add.2 that the withdrawal of tenders was not permitted in Japan.

14. The problem could be resolved if paragraph (3) was modified so as to permit the solicitation documents to state when, if at all, a tender could be withdrawn without forfeiture of the tender security. He proposed that paragraph (3) start with the phrase "If so provided for in the solicitation documents,".

15. Mr. UEMURA (Japan), noting that the withdrawal of tenders was indeed not permitted under Japanese law, said that paragraph (3) should be amended so as to enable the procuring entity to restrict or prohibit the modification or withdrawal of tenders after their submission.

16. Mr. GRIFFITH (Observer for Australia) said that under the common law of his country a tenderer could withdraw a tender after submission unless specifically prohibited from doing so by the solicitation documents.

17. In order to cover all eventualities, perhaps paragraph (3) should state that, if the solicitation documents contained no specific provisions, the ordinary law of the country would prevail, but, if the solicitation documents contained provisions concerning the withdrawal or modification of tenders, those provisions would apply.

18. Ms. PIAGGI-VANOSSI (Argentina), noting that in the Spanish version of paragraph (3) "oferta" would be a better translation of "tender" than "licitación", said that the suggestion made by the Australian delegation seemed a good one.

19. Mr. TUVAYANOND (Thailand) said that perhaps the procuring entity should be allowed to decide whether modification or withdrawal of a tender prior to the submission deadline was permissible. That could be achieved by a phrase such as "Unless otherwise stipulated in the solicitation documents" at the beginning of paragraph (3).

20. Mr. JAMES (United Kingdom) said that, in his view, it was normal that the withdrawal of a tender prior to the submission deadline should be permitted; the real issue was whether the tender security should be forfeited in such a case. He did not think that procuring entities should be encouraged to introduce conditions that would lead to forfeiture of the tender security if the tender was modified or withdrawn prior to the deadline, and he felt it might be wiser to leave paragraph (3) as it stood. If paragraph (3) were to be amended along the lines proposed by the representative of Canada, that would have implications for subparagraph (1) (f) of article 27.

21. Mr. SAHAYDACHNY (Secretariat) said that, when the provision under discussion had been considered at the eleventh session of the Working Group, the Secretariat had been asked to find out what the general practice was in that regard. As he recalled it, the Secretariat's researches had indicated that the provision set forth in the first sentence of paragraph (3) was typical of what was provided for in national legislation.

22. Mr. AZZIMAN (Morocco) said that, in his view, it was illogical to prevent the supplier or contractor from modifying or withdrawing the tender prior to the submission deadline. Accordingly, he had difficulties with the Canadian representative's proposal.

23. Mr. TUVAYANOND (Thailand) said that, while he saw no harm in allowing procuring entities to stipulate that the tender security would be forfeited under specified circumstances, he also did not think that procuring entities should actually be encouraged to make such stipulations. In his opinion, the words "Unless otherwise stipulated in the solicitation documents" would leave procuring entities with the flexibility they needed.

24. Ms. ZIMMERMAN (Canada), recalling her delegation's proposal, said that she could go along with something on the lines of what had been suggested by the observer for Australia.

25. Mr. WALLACE (United States of America) said that he would prefer the phrase "Unless otherwise stipulated in the solicitation documents" suggested by the representative of Thailand.

26. He agreed that changes would be necessary in article 27 - and perhaps also in article 26 (1); in fact, he thought that the second sentence of article 26 (1) could in any case be deleted.

27. Mr. GRIFFITH (Observer for Australia) supported the wording suggested by the representative of Thailand.

28. Mr. LEVY (Canada) said that his delegation could also accept that wording.

29. Mr. JAMES (United Kingdom) said that he could go along with the suggested wording, which would, however, entail changes in articles 21 and 27.

30. The CHAIRMAN said that the drafting group would look into the question of consequential changes and asked the Commission whether it could accept paragraph (3) with the phrase "Unless otherwise stipulated in the solicitation documents," placed at the beginning.

31. It was so decided.

32. The CHAIRMAN, recalling that shortly before the Commission had adopted paragraph (1) with the words "in effect" replaced by "open for acceptance", invited comments on the suggestion by the representative of the United States that the second sentence of the paragraph could well be deleted.

33. Ms. CRISTEA (Observer for Romania) said that, in her view, the second sentence of paragraph (1) served a useful purpose and should therefore be retained.

34. Mr. TUVAYANOND (Thailand), supporting deletion of the second sentence, said that the first sentence was sufficient on its own.

35. Mr. GRIFFITH (Observer for Australia), also supporting deletion of the second sentence, said that the amendment to paragraph (3) which the Commission had just accepted would make it possible for the procuring entity to require that the tender not be withdrawn prior to the submission deadline. That meant that the tender would be open for acceptance prior to the deadline, so that it did not seem very helpful to have a sentence stating when the period of time during which the tender would be open for acceptance would commence.

36. Mr. LEVY (Canada) supported deletion of the second sentence of paragraph (1).

37. Mr. JAMES (United Kingdom) said he had no objection to deletion of the second sentence of paragraph (1). However, there would then be a strong case for retaining the words "in effect" in the first sentence of that paragraph.

38. Mr. GRIFFITH (Observer for Australia) suggested that the point raised by the representative of the United Kingdom be left to the drafting group.

39. The CHAIRMAN said there seemed to be general agreement that the second sentence of paragraph (1) should be deleted.

40. It was so decided.

41. Mr. Mohammed (Nigeria) took the Chair.

Article 27

42. Mr. SAHAYDACHNY (Secretariat), recalling that the Commission had shortly before accepted paragraph (3) of article 26 with the phrase "Unless otherwise stipulated in the solicitation documents," placed at the beginning, said that subparagraph (1) (f) (i) of article 27 would require the addition of a phrase on the lines of "or before the deadline if so stipulated in the solicitation documents".

43. Subparagraph (1) (a) was adopted.

44. Mr. PEREZNIETO CASTRO (Mexico), supported by Mr. MORAN BOVIO (Spain), suggested that in subparagraph (1) (b) the words "or entity" be deleted from the phrase "institution or entity", since in Spanish "entity" might easily be taken to mean the procuring entity.

45. Mr. JAMES (United Kingdom) felt that in English the word "institution" alone was probably not sufficient. The matter seemed to be one of translation and should be referred to the drafting group.

46. Mr. HERRMANN (Secretary of the Commission) said that it might be worth considering use of the phrase "institution or person".

47. Mr. LEVY (Canada) supported the replacement of "or entity" by "or person".

48. Mr. WALLACE (United States of America) asked whether consequential changes would not have to be made in subparagraphs (1) (c), (d), (e) and - possibly - (f).

49. Mr. AL-NASSER (Saudi Arabia) proposed that the expression "financial institution" be used.

50. Mr. MORAN BOVIO (Spain), supporting the replacement of "or entity" by "or person", said that the word "institution" should not be qualified as it covered both financial institutions and non-financial institutions such as insurance companies.

51. Mr. HERRMANN (Secretary of the Commission) said that the change of "or entity" to "or person" in subparagraph (1) (b) would obviously entail consequential changes in the subsequent subparagraphs.

52. With regard to subparagraphs (d) and (e), he suggested that "confirming institution" be replaced by "confirmer".

53. Mr. PARRA PEREZ (Observer for Venezuela) said that the tender securities envisaged in article 27 appeared to be "personal securities" and not "real securities" such as mortgages. Should the Model Law not deal also with the provision of "real securities"?

54. Mr. LEVY (Canada) felt that the point raised by the observer for Venezuela was covered by the words "nature ... of any tender security to be provided ..." in paragraph (1) of article 21.

55. Mr. WALLACE (United States of America) felt that the definition of "tender security" in paragraph (g) of article (2) was broad enough to cover the types of security envisaged by the observer for Venezuela.

56. Mr. MORAN BOVIO (Spain) said that the concept of "real security" was a complicated one and that the type of security needed in the context of the Model Law was one which would easily meet the requirements of the procuring entity.

57. The CHAIRMAN took it that the Commission wished the words "or entity" to be replaced by "or person" in subparagraphs (1) (b) and (c), the words "confirming institution" to be replaced by "confirmer" in subparagraphs (d) and (e), and subparagraph (1) (f) (i) to be brought into line with paragraph (3) of article 26 as accepted by the Commission.

58. It was so decided.

59. Mr. MORAN BOVIO (Spain) said he would like the drafting group to consider inserting a comma after the word "aceptables" in the Spanish version of subparagraph (1) (e).

60. Mr. TUVAYANOND (Thailand) proposed that in the chapeau of paragraph (2) the words "without delay" be replaced by "without undue delay" or "promptly".

61. Mr. LEVY (Canada) said he would prefer "promptly".

62. Mr. MORAN BOVIO (Spain) said he saw no need for a change in the Spanish version of the chapeau.

63. Mr. AZZIMAN (Morocco) said he saw no need for a change in the Arabic and French versions either.

64. The CHAIRMAN took it that the Commission wished "without delay" to be replaced by "promptly".

65. It was so decided.

66. Mr. AZZIMAN (Morocco) suggested that the French version of subparagraph (2) (a) be amended to read "Expiration du délai de la garantie de soumission".

67. Mr. TUVAYANOND (Thailand) suggested that in subparagraph (2) (b) the phrase "by the solicitation documents" be added after "if such a security is required".

68. Mr. JAMES (United Kingdom) said that subparagraph (2) (d) would also need to be brought into line with paragraph (3) of article 6 as accepted by the Commission.

69. Mr. TUVAYANOND (Thailand) said that, in his opinion, the whole of subparagraph (2) (d) after the words "the withdrawal of the tender" could be deleted.

70. Mr. WALLACE (United States of America) said that such a deletion would be a substantive change. It was not something that could be left to the drafting group to decide on.

71. Mr. LEVY (Canada) suggested that the drafting group consider adding "modification or" before "withdrawal" in subparagraph (2) (d) in order to bring the wording into line with that of paragraph (3) of article 26.

72. Mr. TUVAYANOND (Thailand) said he was not sure whether it would be a good idea to add the words "modification or".

73. Mr. AZZIMAN (Morocco) said that the drafting group should not exclude the possibility of leaving subparagraph (2) (d) unchanged.

74. The CHAIRMAN, recalling that the Commission had already agreed that "without delay" should be replaced by "promptly" in the chapeau of paragraph (2), said that, in bringing the paragraph into line with paragraph (3) of article 26 as accepted by the Commission, the drafting group could consider the other suggestions which had been made during the Commission's discussion of paragraph (2).

The meeting rose at 12.30 p.m.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-sixth session

SUMMARY RECORD OF THE 505th MEETING

Held at the Vienna International Centre, Vienna,
on Monday, 12 July 1993, at 2 p.m.

Chairman: Mr. MOHAMMED (Nigeria)

CONTENTS

New international economic order: procurement (continued)

Consideration of draft Model Law on Procurement (continued)

Article 28

Article 29

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Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent within one week of the date of distribution of this document to the Secretary of the Commission, room E0455, Vienna International Centre.

Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

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The meeting was called to order at 2.10 p.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued) (A/CN.9/371, A/CN.9/375, A/CN.9/376 and Add.1, A/CN.9/377)

Consideration of draft Model Law on Procurement (continued)

Article 28

1. Mr. AZZIMAN (Morocco), having suggested that in the French version of the title of article 26 "offres" be changed to "plis", said he had misgivings about the provision in paragraph (1) that the opening of tenders should be exactly simultaneous with the deadline for the submission of tenders. He felt that it would be more reasonable to allow a certain lapse of time between the deadline for the submission of tenders and the opening of the envelopes.

2. The CHAIRMAN said that it was the deliberate intention of the authors of the draft Model Law not to allow any time between the submission deadline and the opening of tenders, so as to preclude opportunities for misconduct. Clearly, however, situations could arise that necessitated a certain lapse of time between the two.

3. Mr. WALSER (Observer for the World Bank), emphasizing the importance of simultaneity, said that the World Bank did not allow any time at all between the two and that he knew of no valid reason for acting otherwise. Even a very short interval could give rise to doubts concerning the submissions.

4. Mr. PRIESTLEY (Observer for Australia), drawing attention to the comments of the Australian Government contained in document A/CN.9/376, wondered whether paragraph (3) was not inconsistent with paragraph (3) of article 11, which admitted at least some circumstances in which tender prices would not be announced to those present at the opening of the tenders.

5. Mr. SAHAYDACHNY (Secretariat) said there did indeed appear to be an inconsistency between paragraph (3) of article 28 and paragraph (3) of article 11.

6. Mr. WALLACE (United States of America) and Mr. MORAN BOVIO (Spain) said that the observer for Australia had raised a very important point.

7. Mr. WALSER (Observer for the World Bank) said that, in his view, the tender prices ought to be read out at the opening of the tenders in order to preclude the possibility of different prices being announced later (which sometimes happened) and in the interests of transparency.

8. Mr. PRIESTLEY (Observer for Australia) said that, if it was considered essential that all tender prices be announced at the opening of the tenders, article 11 would have to be amended.

9. Mr. WALLACE (United States of America) expressed agreement with the observer for Australia.

10. The CHAIRMAN suggested that the Commission accept the principle of the prime importance of tender prices being announced at the opening of tenders and refer the matter to the drafting group, which could propose amendments to article 11 while the Commission adopted article 28 as it stood.

11. It was so decided.

Article 29

12. The CHAIRMAN drew attention to the Secretariat proposal, made in document A/CN.9/377, that the word "prompt" be inserted before "notice" in subparagraph (1) (b).

13. Ms. ZIMMERMAN (Canada), drawing attention to the Canadian Government's comments in document A/CN.9/376/Add.1, said that the first sentence of subparagraph (1) (b) made it mandatory for the procuring entity to correct "purely arithmetical errors apparent on the face of a tender". Her delegation considered that too great an onus was thereby placed on the procuring entity, which might become involved in disputes over whether or not an error was apparent on the face of the tender.

14. Accordingly, her delegation proposed either that the word "shall" be amended to "may" or, preferably, that the paragraph read "the procuring entity shall correct purely arithmetical errors that it may discover on the face of a tender".

15. Mr. WALLACE (United States of America) said that, in his view, the second proposed amendment would only slightly reduce the onus on the procuring entity.

16. He was opposed to replacing "shall" by "may", the first proposed amendment, since it ran counter to the purpose of subparagraph (1) (b), which was to prevent the procuring entity from rejecting a tender as unresponsive when it discovered purely arithmetical errors.

17. Mr. JAMES (United Kingdom) said he too was opposed to the replacement of "shall" by "may"; in his view, the rule must be mandatory.

18. As to the second proposal, he did not consider it unreasonable to require that the procuring entity correct purely arithmetical errors. Subparagraph (1) (b) should be left as it stood.

19. Ms. ZIMMERMAN (Canada) said that, with the present wording, if the procuring entity failed to discover an arithmetical error made by a tenderer it might become responsible for that error; tenderers should be responsible for getting their figures right.

20. Mr. MORAN BOVIO (Spain) said he would prefer the wording to remain unchanged.

21. Mr. LEVY (Canada) said that the Commission had to ensure a proper balance between the obligations of the procuring entity and those of the supplier or contractor. Clearly, if the procuring entity discovered an arithmetical error, it should correct it, but there was no reason why the procuring entity should be penalized for overlooking what the bidder had overlooked.

22. Ms. PIAGGI-VANOSSI (Argentina) said that, while she preferred subparagraph (1) (b) as it stood, she considered the second Canadian proposal acceptable; the procuring entity would not be required to make an exhaustive search for arithmetical errors - merely to correct those which were obvious.

23. Mr. GRUSSMANN (Austria), supporting the replacement of "shall" by "may", said that under Austria's procurement law the procuring entity could not correct arithmetical errors if they corresponded to more than 2 per cent of the estimated value of the contract. Reliability was considered important, and tenders which contained significant arithmetical errors were rejected.

24. Ms. CRISTEA (Observer for Romania) said that before correcting an arithmetical error the procuring entity would have to consult with the supplier or contractor that had made the error. That point should be reflected in the text.

25. Mr. WALLACE (United States of America) said that subparagraph (1) (b) should be read in the light of the draft Guide to Enactment (document A/CN.9/375) and in conjunction with subparagraph (3) (b), which permitted the supplier or contractor to withdraw his tender - possibly forfeiting his tender security - if he did not accept a correction of the mathematical error.

26. Mr. WALSER (Observer for the World Bank) said that obvious arithmetical errors had to be corrected and that article 29 as it stood was perfectly adequate for ensuring that they were.

27. Mr. JAMES (United Kingdom) said that, although - as stated earlier - he did not consider it unreasonable to require that the procuring entity correct purely arithmetical errors, he did not consider it the job of the procuring entity to inquire whether a supplier or contractor had meant to submit a different figure.

28. On the other hand, with regard to the words "errors that it may discover" in the second Canadian proposal, he pointed out that the procuring entity could easily claim that it had not noticed a particular error. Accordingly, he felt that subparagraph (1) (b) should be left as it stood.

29. Mr. WALLACE (United States of America) said that, while he would prefer subparagraph (1) (b) to remain unchanged, a formulation on the lines of "the procuring entity shall correct purely arithmetical errors which it discovers or reasonably might have discovered" would be an acceptable compromise in his opinion.

30. Mr. BARICAKO (Observer for the Organization of African Unity) said it was not legally sound to place on the procuring entity a duty which should lie with the supplier or contractor. Provision should therefore be made for the procuring entity to correct any errors which it might discover without any detraction from the responsibility of the supplier or contractor for ensuring the accuracy of the figures submitted.

31. Mr. LEVY (Canada), referring to the words "or reasonably might have discovered" suggested by the representative of the United States of America, said they could well result in recourse to a court or administrative

(Mr. Levy, Canada)

tribunal for a decision on what was "reasonable". In his delegation's opinion, subparagraph (1) (b) should provide for correction by the procuring entity of any arithmetical errors which it discovered, with no penalty if the procuring entity failed to discover all such errors.

32. Mr. PEREZNIETO CASTRO (Mexico) said that the problem appeared to affect only English-speaking, common law countries; the French and Spanish versions of subparagraph (1) (b) did not give rise to difficulties. The compromise suggestion made by the United States representative would reduce the onus on the procuring entity and should meet the concerns of common law countries. If it was accepted, the Commission's thinking could be reflected in the Guide to Enactment.

33. Mr. GRIFFITH (Observer for Australia) said that, in his opinion, the words suggested by the United States representative would increase rather than reduce the onus on the procuring authority.

34. His delegation preferred "may correct" to "shall correct", but otherwise felt that the present text was broadly suitable.

35. Mr. WALSER (Observer for the World Bank) said that, if the concern was for the procuring entity's responsibility, wording along the lines of "or reasonably might have discovered" was not very helpful. He suggested the following wording: "the procuring entity shall correct purely arithmetical errors which might be discovered during tender evaluation".

36. Mr. PHUA (Singapore) said the discussion seemed to be based on the premise that the procuring entity would discover the errors and, having discovered them, would know how to correct them.

37. He proposed that subparagraph (1) (b) start with the sentence "The procuring entity shall not reject a tender on the grounds that there are purely arithmetical errors apparent on the face of the tender". The present first sentence might then be amended to read as follows: "Notwithstanding subparagraph (a) of this paragraph, the procuring entity shall correct purely arithmetical errors apparent on the face of the tender that it discovers".

38. Mr. KOMAROV (Russian Federation), agreeing with the Canadian delegation that subparagraph (1) (b) placed too great an onus on the procuring entity, said that subparagraph (1) (a) provided the procuring entity with an opportunity to resolve a variety of problems - including, in his opinion, the problem of arithmetical errors. He therefore felt that subparagraph (1) (b) could simply be deleted.

39. Ms. ZHANG Yuejiao (China) suggested the wording "the procuring entity shall authorize the supplier or contractor to correct purely arithmetical errors", it being understood that the procuring entity would not be allowed to reject corrections made by the supplier or contractor.

40. The CHAIRMAN, emphasizing the need to strike a balance betweeen the responsibilities of the procuring entity and those of the supplier or contractor, asked whether the wording suggested by the observer for the World Bank was acceptable to the Commission.

41. Mr. GRIFFITH (Observer for Australia) wondered whether the drafting group could look at the possibility of using "are" in place of "might be" in the wording suggested by the observer for the World Bank.

42. Mr. LEVY (Canada) said he could accept the wording if "might be" was replaced by "are".

43. Mr. JAMES (United Kingdom) said that he was happy with "might be". There was a substantive difference between "might be" and "are", and the matter should not be left to the drafting group.

44. Mr. WALLACE (United States of America) regretted that the suggested wording did not include the phrase "on the face of a tender".

The meeting was suspended at 2.45 p.m. and resumed at 4.20 p.m.

45. The CHAIRMAN said that the following wording was now being proposed for subparagraph (1) (b): "Notwithstanding subparagraph (a) of this paragraph, the procuring entity shall correct purely arithmetical errors which are discovered on the face of a tender". He asked whether the Commission could accept that wording.

46. It was so decided.

47. The CHAIRMAN asked whether, since there had been no discussion of the Secretariat proposal that "prompt" be inserted before "notice" in the second sentence of subparagraph (1) (b), the proposal in question was acceptable to the Commission.

48. Ms. ZIMMERMANN (Canada) pointed out that there were a number of places in the Model Law where the procuring entity was required to "give notice" and that the question had not arisen of adding "prompt" in each such case.

49. Mr. GRIFFITH (Observer for Australia), pointing out that subparagraph (3) (b) enabled a supplier or contractor to accept or reject a correction, said it was important that the process be expedited. He therefore favoured insertion of the word "prompt".

50. The CHAIRMAN took it that the Commission wished to word "prompt" to be inserted.

51. It was so decided.

52. The CHAIRMAN asked whether the Commission accepted the text of paragraph (2) as drafted.

53. It was so decided.

54. Mr. ALSHTYWI (Observer for the Libyan Arab Jamihirya), pointing out that article 28 (2) referred to the representatives of suppliers or contractors, suggested that in subparagraph (3) (b) of article 29 the words "or a representative" be inserted after "supplier or contractor".

55. The CHAIRMAN said that, if that insertion were made in subparagraph (3) (b), similar insertions would have to be made elsewhere. References in the Model Law to suppliers or contractors were intended to include their representatives.

56. Mr. GRIFFITH (Observer for Australia) agreed; it was clear that a representative should be able to accept a correction under subparagraph (3) (b). Representatives could act for suppliers and contractors in all respects except the formal execution of a document, which might require sealing.

57. Mr. PEREZNIETO CASTRO (Mexico) said that in most States such questions were governed by laws not relating to procurement. The draft Model Law presupposed that suppliers and contractors would have representatives acting for them.

58. Mr. GRIFFITH (Observer for Australia) said that subparagraph (3) (b) seemed to give suppliers and contractors a choice of whether or not to accept a correction of an arithmetical error, although such errors were open to correction under subparagraph (1) (b). Noting that suppliers and contractors sometimes made deliberate arithmetical errors, he suggested that in order to prevent them from deriving an advantage from such errors, subparagraph (3) (b) be deleted.

59. Mr. WALLACE (United States of America) said that, as far as he could recall, it had been felt in the Working Group when drafting paragraph (3) that, for practical reasons, it would be better for the procuring entity simply to reject a tender containing a serious arithmetical error which the supplier or contractor would not allow to be corrected rather than to hold the supplier or contractor to that tender; if the supplier or contractor were held to the tender, the matter would almost certainly end in litigation.

60. Mr. MORAN BOVIO (Spain) said that there appeared to be a balance between subparagraph 1 (b) and subparagraph 3 (b) and that, if the latter subparagraph were deleted, the former one would have to be deleted also. To him it seemed obvious that, if a supplier or contractor refused to accept a correction of an arithmetical error made by the procuring entity pursuant to subparagraph (1) (b), the procuring entity should not accept the tender.

61. The CHAIRMAN took it that the Commission wished to retain subparagraph (3) (b).

62. It was so decided.

63. The CHAIRMAN, inviting the Commission to consider paragraph (4), drew attention to the Secretariat suggestion in document A/CN.9/377 that in subparagraph (4) (d) an express requirement that use of a margin of preference should be reflected in the record be added.

64. Mr. PRIESTLEY (Observer for Australia), having expressed support for the suggestion, said his delegation was concerned that the price factor should not be overemphasized. In document A/CN.9/376, commenting on article 28, his Government stated that the practice contemplated by paragraphs (2) and (3) of that article "places the emphasis on the price as being the main factor on which the contract is let, and thereby could be seen as giving the suppliers the wrong message. Modern practices try to achieve maximum value for money and price is only one of the factors considered." Commenting on article 29, his Government mentioned several other factors which were taken into account in evaluating tenders.

65. As pointed out in paragraph (3) of the commentary on article 29 in the draft Guide to Enactment (document A/CN.9/375), "in some tendering proceedings, the procuring entity may wish to select a tender not purely on the basis of the price factor". The Model Law accordingly enabled the procuring entity to select the "lowest evaluated tender", i.e. to select on the basis of criteria in addition to price. Subparagraphs (4) (c) (ii) and (iii) indicated the non-price criteria envisaged in the Model Law.

66. However, subparagraphs (4) (c) (ii) and (iii) did not adequately address his Government's concerns. For instance, in considering two tenderers which met the prequalification requirements and offered identical engineering skills and financial and personnel capabilities, the procuring entity might prefer the tenderer with previous experience of the particular type of work required. It was important to ensure that the procuring entity could select that tenderer, even where there was a price margin in favour of the less experienced tenderer.

67. He was not convinced that under subparagraphs (4) (c) (ii) and (iii) the procuring entity could. Nor was it clear from articles 6 and 21 that the procuring entity would have a sufficient margin of discretion in such cases. He therefore suggested amending subparagraph (4) (b) (i) to begin something like "the tender from that tenderer which has been determined to be fully capable of undertaking the contract and whose tender contains the lowest tender price ...". That amendment, if approved, would provide the necessary latitude for the procuring entity to disregard the lowest tender price if necessary.

68. Mr. WALLACE (United States of America) said that the Model Law had been drafted in such a way as to deal with the concerns of the Australian Government. First, formal tendering was only one of the methods open to procuring entities; the other methods, such as two-stage tendering, competitive negotiation and a request for proposals, allowed for consideration of a mixture of price and non-price factors. Secondly, even formal tendering offered a degree of latitude, because tenders were judged on the basis of qualification and responsiveness as well as of price.

The meeting rose at 5 p.m.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-sixth session

SUMMARY RECORD OF THE 506th MEETING

Held at the Vienna International Centre, Vienna,
on Tuesday, 13 July 1993, at 9.30 a.m.

Chairman: Mr. MOHAMMED (Nigeria)

CONTENTS

New international economic order: procurement (continued)

Consideration of draft Model Law on Procurement (continued)

Article 29 (continued)

Article 30

Article 31

Article 32

Articles 33 and 34

Article 35

Article 36

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Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

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The meeting was called to order at 9.45 a.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued) (A/CN.9/371, A/CN.9/375, A/CN.9/376 and Add. 1 and 2, A/CN.9/377)

Consideration of draft Model Law on Procurement (continued)

Article 29 (continued)

1. The CHAIRMAN invited the Commission to continue its discussion of paragraph (4).

2. Mr. SHIMIZU (Japan), referring to subparagraph (4) (c) (iii), said that, as the Working Group's text was the result of long discussions, he would not propose the deletion of the subparagraph. He wished to say for the record, however, that his delegation would have preferred its deletion. First, his delegation considered, as a matter of principle, that the evaluation of tenders should be based on price factors. Secondly, to allow a procuring entity to consider factors with political implications could lead to abuse; such factors should be considered by high governmental authorities. Lastly, the factors indicated in subparagraph (4) (c) (iii) could undermine the logical structure of the tendering procedure as envisaged in the draft Model Law.

3. Mr. MORAN BOVIO (Spain), referring to the suggestion made by the observer for Australia at the previous meeting for an amendment to subparagraph (4) (b) (i), said he agreed with what had been said by the representative of the United States of America and felt that it would be preferable to leave the subparagraph as it stood.

4. Mr. WALSER (Observer for the World Bank) said that the qualifications of suppliers and contractors should not be considered in the evaluation of tenders since it would already have been decided in the prequalification process which suppliers and contractors had the necessary qualifications. To attempt to compare the qualifications of one bidder with those of another would introduce an element of subjectivity and could encourage corruption. However, article 7 made prequalification proceedings optional, and it was not clear to him what would happen if there were no prequalification proceedings. To deal with that point, the amendment suggested by the observer for Australia might be justified. He would welcome clarification from the Secretariat.

5. Mr. SAHAYDACHNY (Secretariat) noted that, under article 29 (3) (a), a tender submitted by a supplier or contractor that was not qualified must be rejected.

6. Mr. WALSER (Observer for the World Bank) said that, in that case, he felt that the suggested amendment was unnecessary.

7. Mr. WALLACE (United States of America) said that there was a logical structure to the draft Model Law and that the question of qualifications, which was adequately covered by articles 6 and 7 and article 29 (3) (a), should be kept separate.

8. Mr. PRIESTLEY (Observer for Australia) said that his delegation had raised the point in order to hear the views of others and would not press the suggestion which he had made at the previous meeting.

9. The CHAIRMAN said he took it that the Secretariat's suggestion for an amendment to subparagraph (4) (d) (see document A/CN.9/377) was accepted.

10. It was so decided.

11. Paragraph (4) of article 29, as amended, was adopted.

12. Mr. MORAN BOVIO (Spain), referring to paragraph (5), noted the amendment to that paragraph proposed by the Secretariat in document A/CN.9/377. The proposal seemed a good one; however, he wondered whether the rest of the paragraph could not be simplified by saying merely that the tender prices of all tenders were to be converted to the currency specified in the solicitation documents, without referring to the expression of prices in "two or more currencies".

13. Mr. PEREZNIETO CASTRO (Mexico), supporting that suggestion, asked what would happen if no currency were specified in the solicitation documents.

14. Mr. MORAN BOVIO (Spain) noted that article 21 (r) required the solicitation documents to state the currency that was to be used for the purpose of evaluating and comparing tenders. Without that information, the solicitation documents would be incomplete.

15. Mr. JAMES (United Kingdom) supported the Secretariat's proposal and the suggestion made by the representative of Spain. The wording could be finalized by the drafting group.

16. Mr. WALLACE (United States of America), welcoming the reference to article 21 (r) contained in the Secretariat's proposal, agreed with what had been said by the representative of the United Kingdom.

17. Ms. CRISTEA (Observer for Romania) wondered whether the reference was necessary, since there was a reference to article 29 (5) in article 21 (r).

18. The CHAIRMAN said that the Secretariat's proposal and the suggestion made by the representative of Spain seemed to be acceptable in principle, but that it would be for the drafting group to finalize the wording. He suggested that paragraph (5) be adopted on that understanding.

19. It was so decided.

20. Paragraphs (6), (7) and (8) were adopted.

Article 30

21. Article 30 was adopted.

Article 31

22. Mr. RAO (India), drawing attention to the commentary on article 31 in the draft Guide to Enactment (document A/CN.9/375), said that the article seemed to address only the interests of suppliers and contractors. There was a need, however, to address also the interests of the procuring entity when suppliers or contractors were engaging in price-fixing.

23. In India, the Government did not resort to negotiation as a general rule. However, when there was evidence that a cartel of suppliers or contractors had caused unreasonable prices to be quoted, the Government did enter into negotiations with all tenderers.

24. Accordingly, he felt that the article should be amended through the addition of a phrase on the following lines: "except when the procuring entity has reason to believe that the supplier or contractor has entered into a price-fixing arrangement".

25. Mr. WALLACE (United States of America), noting that the representative of India had raised an interesting point, said that the purpose of article 31 was to preserve the integrity of competitive tendering. The article, which was based on the assumption that honest suppliers and contractors would not participate in competitive tendering if they thought that the procuring entity might try to force them to lower their prices, removed the temptation for the procuring entity to attempt to obtain a lower price - thereby perhaps ending up with a poorer product or a poorer job.

26. Article 33, which was extremely strict, complemented article 21, which stated what solicitation documents should contain. If the procuring entity could not provide solicitation documents containing all the requisite information, it should not proceed with competitive tendering but choose another procurement method.

27. Cartels could be dealt with under article 30, which provided for the rejection of all tenders - for example, if the procuring entity believed it was faced with a price ring. Moreover, the draft Model Law did not exclude recourse to criminal law, and it referred to the disqualification of suppliers and contractors found to have acted improperly.

28. Mr. MORAN BOVIO (Spain), agreeing with the representative of the United States of America, said that, if tender prices could be changed through negotiation, instability would result.

29. Mr. WALSER (Observer for the World Bank), agreeing with the representatives of the United States of America and Spain, said that the prohibition of negotiation was central to competitive tendering, where suppliers and contractors knew that they had just one chance to quote their best possible price.

30. In countries where negotiations were permitted, suppliers and contractors might quote prices 5-10 per cent above their best possible prices in the knowledge that they could come down by 3-4 per cent in the course of negotiations and still earn more than they would if no negotiations were permitted.

(Mr. Walser, Observer for the World Bank)

31. To his knowledge, price-fixing did not occur in international trading. If it ever should occur, the procuring entity could reject all bids under article 30 and resort to two-stage tendering, a request for proposals or competitive negotiation under article 14 (d). Certainly article 31 should not be modified in order to provide for such an occurrence.

32. Mr. LEVY (Canada), recognizing the importance of the point raised by the representative of India, said it was facile to say that the procuring entity could reject all tenders; it might not be immediately apparent that they were not in order. Procuring entities often did not realize until after the conclusion of a contract that there had been collusion among the suppliers or contractors. In Canada, investigators had on two occasions discovered the existence of a cartel only about a year after conclusion of the contract.

33. The problem was a serious one, and he had not found any way of dealing with it in procurement law. To allow negotiations would not solve it, and article 31 should therefore be kept as it stood.

34. Mr. PEREZNIETO CASTRO (Mexico) said that there should be no negotiation in the competitive tendering process and that the Model Law provided for negotiation within the framework of other procurement methods.

35. The CHAIRMAN said it seemed that the Commission's view was that the prohibition of negotiation as reflected in article 31 should be retained as the Model Law provided for a variety of methods other than competitive tendering whereby negotiation could take place. If that was so, article 31 could be adopted as it stood.

36. Article 31 was adopted.

Article 32

37. Paragraphs (1) and (2) were adopted.

38. Mr. SAHAYDACHNY (Secretariat), introducing the amendment to paragraph (3) proposed by the Secretariat in document A/CN.9/377, said the intention was to make it clear that, if approval by a higher authority was required, the requirement - reflected in article 21 (x) - should be referred to in the solicitation documents.

39. Paragraph (3) was adopted with the amendment proposed by the Secretariat.

40. Paragraphs (4) and (5) were adopted.

41. Ms. ZIMMERMAN (Canada), noting the Secretariat's proposal in document A/CN.9/377 relating to paragraph (6), recalled that, under article 11 (2), a portion of the record of procurement proceedings was available for inspection by any person. Extending the disclosure requirement provided for in paragraph (6) of article 32 did not therefore seem very useful, and it might even result in an onerous duty for the procuring entity. Her delegation would prefer that paragraph (6) be left unchanged.

42. Mr. WALLACE (United States of America) said that, having examined a similar proposal made by Japan (in document A/CN.9/376/Add.2), he considered the Secretariat proposal to be useful. Publication of a notice of the procurement contract need not be an onerous duty; an official gazette or a similar journal could be used.

43. Mr. LEVY (Canada) said it was not clear from the Secretariat's proposal whether a notice would have to be published even in the case of a very small contract.

44. With regard to the idea of publishing in an official gazette or a similar journal, the notice would probably appear too late to serve any purpose, and official gazettes and the like were normally read only by civil servants.

45. Ms. CRISTEA (Observer for Romania) said that, although she was in favour of promoting transparency in the procurement process, she doubted whether States would agree to publish the notice of a procurement contract - for instance, by advertising in a national newspaper - if the contract had a bearing on national security.

46. Mr. JAMES (United Kingdom) said that, as article 11 (2) required that a portion of the record of procurement proceedings be made available for inspection by any person, the concern behind the Secretariat's proposal could perhaps be met if the name and address of the successful tenderer were also included in the record.

47. He agreed with the observer for Romania that States were likely to be extremely reluctant about publishing the notice of a procurement contract which had a bearing on national security. Under article 1, however, procurement involving national security could be excluded from the Model Law's scope of application if the State so decided.

48. Mr. KOMAROV (Russian Federation), expressing support for the Secretariat's proposal, said, with regard to the point raised by the observer for Romania, that in cases of restricted tendering (provided for in article 18 (3)) the obligation to publish would be restricted.

49. Mr. LEVY (Canada) suggested that article 11 (1) (b) be amended along the lines envisaged by the United Kingdom representative. As to the point raised by the observer for Romania, he was not sure that it was adequately met by article 11 as currently drafted.

50. Mr. WALLACE (United States of America), having also referred the observer for Romania to article 1, said that the requirement to publish the notice of a procurement contract might in some cases be burdensome, but the burdens imposed by the Model Law were in the interests of - inter alia - greater transparency. In any case, the provision could be worded in such a way as to ensure that the requirement was not unreasonable.

51. He agreed with the comment of the Japanese Government that the publication requirement should be extended to other procurement methods, including single-source procurement.

52. Mr. SHIMIZU (Japan) expressed support for the Secretariat's proposal.

53. Ms. ZHANG Yuejiao (China) said her delegation was in favour of transparency provided that there was no conflict with considerations of public interest, law enforcement and national security.

54. She suggested that, in order to meet any concerns about publication costs, wording on the lines of "... the procurement contract shall be made publicly available" might be used; publication would then not be necessary, but it should be possible for interested parties to obtain the information they wanted.

55. The CHAIRMAN said he took it that the Commission wanted paragraph (6) to allow for publication of the notice of a procurement contract, but in a manner that would not involve undue expense for the procuring entity, and article 11 (1) (b) to be amended by the addition of the words "and the name and address of the supplier or contractor to which the contract is awarded".

56. It was so decided.

Articles 33 and 34

57. Articles 33 and 34 were adopted.

Article 35

58. Mr. WALLACE (United States of America) noted that in document A/CN.9/377 the Secretariat proposed the addition in paragraph (4) of the sentence "The procuring entity shall select the successful offer on the basis of the best and final offers." He suggested that the end of the sentence be amended to read "... on the basis of such best and final offers".

59. Article 35, as amended, was adopted.

Article 36

60. Mr. SAHAYDACHNY (Secretariat) said that, on reflection, the Secretariat wished to withdraw the proposal made in document A/CN.9/377 for amending paragraph (1).

61. Mr. KOMAROV (Russian Federation) suggested that the problem of deciding what elements were to be included in the price could be resolved by a reference, in the Guide to Enactment, to INCOTERMS, published by the International Chamber of Commerce (ICC).

62. Ms. CRISTEA (Observer for Romania) and Mr. MORAN BOVIO (Spain) agreed with the representative of the Russian Federation.

63. The CHAIRMAN said that a reference to INCOTERMS could be included in the Guide to Enactment and took it that the Commission wished to adopt paragraph (1) as submitted by the Working Group in document A/CN.9/371.

64. It was so decided.

65. Paragraph (2) was adopted.

66. Mr. WALLACE (United States of America), in response to the representatives of Mexico and Thailand, said that the word "reliable" in paragraph (5) related to "the supplier or contractor".

67. Mr. TUVAYANOND (Thailand) said he found the phrase "responsive to the needs" in paragraph (3) too vague; who decided on the needs of the procuring entity?

68. Mr. WALSER (Observer for the World Bank) said that the phrase "considered reliable" was vague and suggested instead "considered qualified".

69. Also, he suggested the replacement of "responsive to the needs of the procuring entity" by "responsive to specifications".

70. Mr. KOMAROV (Russian Federation) supported the suggestions made by the observer for the World Bank.

71. Mr. SAHAYDACHNY (Secretariat) said that the words "responsive to specifications" would be in line with the intention of the Working Group. However, the words "considered qualified" might imply that requests for quotations involved the full panoply of provisions of articles 6 and 7.

72. Mr. LEVY (Canada), supporting the remarks made by the representative of the Secretariat, said that "responsive to specifications" might represent an improvement, but not "considered qualified".

73. Mr. WALLACE (United States of America) said he felt that the words "responsive to specifications" implied too much formality; as indicated in article 15, requests for quotations were made for the procurement of "readily available goods that are not specially produced to the particular specifications of the procuring entity".

74. He shared the opinion of the Secretariat regarding the words "considered qualified".

75. Mr. JAMES (United Kingdom), referring to the words "responsive to specifications", said that it would be wrong to use wording which suggested that requests for quotations could be used in procuring goods other than readily available ones.

76. Ms. ZIMMERMAN (Canada) agreed with the representative of the United Kingdom.

77. Mr. WALLACE (United States of America) suggested that perhaps the concerns of the representative of Thailand could be met by replacing "responsive to the needs" by "meeting the needs".

78. Mr. TUVAYANOND (Thailand) welcomed the suggestion made by the representative of the United States of America.

79. The CHAIRMAN said that he took it that the Commission wished to adopt paragraph (3) with "responsive to the needs" replaced by "meeting the needs".

80. It was so decided.

The meeting rose at 12.30 p.m.

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Twenty-sixth session

SUMMARY RECORD OF THE 507th MEETING

Held at the Vienna International Centre, Vienna,
on Tuesday, 13 July 1993, at 2 p.m.

Chairman: Mr. MOHAMMED (Nigeria)

CONTENTS

New international economic order: procurement (continued)

Consideration of draft Model Law on Procurement (continued)

Article 37

Article 15 bis and 36 bis

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Any corrections to the records of the meetings of this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

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The meeting was called to order at 2.10 p.m.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued) (A/CN.9/371, A/CN.9/375, A/CN.9/376 and Add.1 and 2, A/CN.9/377; A/CN.9/XXVI/CRP.5)

Consideration of draft Model Law on Procurement (continued)

Article 37

1. Mr. GRIFFITH (Observer for Australia) said that it might be appropriate for article 37 to become part of article 16, so that single-source procurement was dealt with entirely in article 16 rather than in two articles.

2. Mr. HERRMANN (Secretary of the Commission) said that, during the Commission's previous session, the drafting group had felt that there should be a clear separation between the conditions for using different procurement methods (dealt with in chapter II) and the procedures for procurement methods other than tendering (dealt with in chapter IV). There was little to be said about procedures in the case of single-source procurement, but for the sake of consistency it had been felt that an article concerning that method should appear in chapter IV.

3. Mr. WALLACE (United States of America) suggested that, like article 36 (3), article 37 conclude with a phrase concerning the reliability of the supplier or contractor. He could go along with the words "considered qualified", which had been considered at the previous meeting in connection with article 36 (3), provided it was understood that, in the present case also, they did not imply that all the provisions of articles 6 and 7 would come into play.

4. Mr. WALSER (Observer for the World Bank) said that, in his opinion, the words "considered qualified" did not mean that the procuring entity would have to ascertain the qualifications of suppliers and contractors or engage in prequalification proceedings. Perhaps a phrase like "that is qualified as defined in article 6 (2)" at the end of article 37 would be appropriate as it appeared to be generally agreed that article 6 (2) should apply whatever procurement method was used.

5. It was surprising that article 37 referred back to article 16 ("Conditions for use of single-source procurement"), while articles 33-36 did not refer back to articles 14 and 15. Perhaps the appropriate references should be inserted in articles 33 to 36.

6. Mr. LEVY (Canada) felt that one could safely add the phrase "that is considered reliable by the procuring entity" at the end of article 37.

7. Mr. SAHAYDACHNY (Secretariat) suggested that, if such a phrase was added, the Commission might wish the drafting group to devise language that would ensure that, in assessing the reliability of a supplier or contractor, the procuring entity did not consider factors other than those whose consideration was envisaged in article 6.

8. Mr. JAMES (United Kingdom) said that, as he understood it, the Commission wished to allow the procuring entity to assess reliability, but not by means of the formal procedures provided for in article 6.

9. Mr. SAHAYDACHNY (Secretariat) said that the Working Group had moved article 6 into chapter I, "General provisions", because it had felt that it should apply to all methods of procurement. In any case, perhaps there was not much difference between the information which the procuring entity might seek pursuant to article 6 and the information which it might seek in assessing reliability in connection with requests for quotations and with single-source procurement.

10. Mr. WALLACE (United States of America), pointing out that the enumeration in article 6 (2) (a) actually included "reliability", said that in the wording which was being sought a distinction should be made between article 6 and the criteria set forth in subparagraphs (2) (a) to (e) of that article.

11. Mr. LEVY (Canada) felt that in the case of requests for quotations and single-source procurement it was not necessary to refer to the criteria set forth in subparagraphs (2) (a) to (e) of article 6.

12. Perhaps one could add at the end of article 6 (1) a phrase like "except for procurement made in accordance with articles 36 and 37".

13. Mr. TUVAYANOND (Thailand) said he understood that article 6 applied to all the procurement methods envisaged in the Model Law. Accordingly, he felt that articles 36 and 37 should be linked in some way to article 6, paragraph (2) of which was in any case not mandatory - as made clear by the words "the procuring entity may require" in the chapeau.

14. Mr. WALSER (Observer for the World Bank) said that use of the word "reliable" might open the way to subjective judgements and that he did not see why the criteria set forth in subparagraphs (2) (a) to (e) of article 6 should not apply to all procurement methods. The procurements envisaged by paragraph (2) were not very complicated.

15. Ms. PIAGGI-VANOSSI (Argentina) supported the views expressed by the observer for the World Bank.

16. Mr. LEVY (Canada), agreeing that the words "the procuring entity may require" in the chapeau of paragraph (2) of article 6 meant that that paragraph was not mandatory, suggested that article 36 (3) and article 37 might be drafted in such a way as to convey the idea that "the procuring entity may have regard to the criteria set forth in article 6 (2) (a) to (e) if it so desires".

17. Mr. TUVAYANOND (Thailand), supporting the suggestion made by the representation of Canada, suggested that the expression "mutatis mutandis" be incorporated into the wording in question.

18. Mr. JAMES (United Kingdom) suggested for article 36 (3) and article 37 a formulation on the lines of "supplier or contractor that is considered by the procuring entity to satisfy such of the criteria set forth in

(Mr. James, United Kingdom)

subparagraphs (a) to (e) of article 6 (2) as the procuring entity considers appropriate in the circumstances".

19. Mr. TALICE (Uruguay) suggested that, given the non-mandatory character of article 6 (2), one might speak in article 36 (3) and article 37 of "full or partial compliance with the criteria set forth in article 6 (2)".

20. The CHAIRMAN suggested that the Commission request the drafting group to devise wording on the lines of "supplier or contractor that is considered reliable and satisfies such requirements as stipulated in article 6 (2) (a) to (e)".

21. Mr. LEVY (Canada) asked whether the Commission wished to redraft article 6 (1) so as to exempt requests for quotations and single-source procurement from the scope of application of article 6.

22. Mr. TUVAYANOND (Thailand) said that, in his opinion, article 6 should remain as it stood.

23. Mr. HERRMANN (Secretary of the Commission) said that the inclusion in article 36 (3) and article 37 of wording on the lines of "the procuring entity may have regard to the criteria set forth in article 6 (2) (a) to (e) if it so desires" would result in doubts about the position as regards procurement methods other than requests for quotations and single-source procurement.

24. Mr. WALLACE (United States of America) suggested that no phrase about reliability be added to article 37 and that the words "and that is considered reliable by the procuring entity" in article 36 (3) be deleted.

25. Mr. LEVY (Canada) supported the suggestion.

26. Mr. JAMES (United Kingdom) said that the suggestion made by the representative of the United States of America would sever the link between article 36 (3) and article 37 on one hand and article 6 on the other. If there was to be no reference to reliability in article 36 (3) and article 37, there should be a reference to qualifications.

27. Mr. TUVAYANOND (Thailand) said he would like to see a reference to reliability in both article 36 (3) and article 37.

28. Mr. WALSER (Observer for the World Bank), agreeing with the United Kingdom representative, said he believed that there should be a reference to qualifications not only in article 36 (3) and article 37, but also in articles 33 to 35.

29. Ms. PIAGGI-VANOSSI (Argentina) supported the United States representative's suggestion that there should be no reference to reliability in article 36 (3) and article 37 and the suggestion made by the representative of Thailand with regard to the addition of "mutatis mutandis".

30. Mr. WALLACE (United States of America) suggested asking the drafting group to devise a form of words for article 6 which would authorize the procuring entity to have maximum regard to the criteria set forth in subparagraphs (2) (a) to (e) of that article.

31. The CHAIRMAN said that the drafting group could be asked to redraft article 6 (1). The Commission still had to decide whether there should be references to reliability in article 36 (3) and article 37.

32. Mr. TUVAYANOND (Thailand) said he would not press his view if article 6 could be construed as permitting the procuring entity to take account of the reliability of the supplier or contractor.

33. The CHAIRMAN asked the United States representative whether, in his opinion, a supplier or contractor could meet the standards of article 6 (2) (a) to (e) without being reliable.

34. Mr. WALLACE (United States of America) said he thought that article 6 could be modified in such away as to address the point made by the representative of Thailand and the point made by the observer for the World Bank.

35. Mr. TALICE (Uruguay) suggested that, if the last phrase of article 36 (3) was to be deleted, article 6 (1) be modified so as to indicate that all procurement methods fell within the scope of application of article 6.

The meeting was suspended at 3.35 p.m. and resumed at 4.15 p.m.

36. Mr. SAHAYDACHNY (Secretariat) proposed the insertion, near the beginning of article 6, of a sentence on the lines of "No procurement shall be entered into unless the supplier or contractor is qualified". He also proposed that paragraph (2) include a provision on the lines of "Suppliers or contractors shall be deemed qualified to perform the procurement contract if they meet such of the following criteria as the procuring entity deems appropriate in the particular case", followed by the criteria set forth in subparagraphs (2) (a) to (e).

37. The intention behind those proposals was that all methods of procurement should be covered, but that the procuring entity should not be required to carry out exhaustive assessments of qualifications. There would be due regard to the importance of reliability in the context of requests for quotations and single-source procurement without, however, any reference to reliability in article 36 (3) or article 37.

38. Mr. LEVY (Canada) and Mr. TUVAYANOND (Thailand) welcomed the proposals.

39. The CHAIRMAN took it that the Commission wished to adopt article 37 in the light of those proposals.

40. It was so decided.

41. Mr. WALLACE (United States of America), recalling the decisions taken by the Commission at its previous meeting regarding article 32 (6) and article 11 (1) (b), said that the Commission appeared not to have dealt with the comment of the Japanese Government (in document A/CN.9/376/Add.2) that "this requirement of publication should ... be extended to other methods of procurement, including single-source procurement".

Articles 15 bis and 36 bis

42. The CHAIRMAN, recalling the discussion on article 18 (3) during the Commission's 502nd meeting, opened for discussion the articles on restricted tendering proposed by the Inter-American Development Bank in document A/CN.9/XXVI/CRP.5. He said that, if the two articles were adopted, article 18 (3) would be deleted.

43. Mr. SAHAYDACHNY (Secretariat) said that, if the two articles were adopted, their wording would need to be aligned with the terminology used elsewhere in the Model Law; unless matters of substance were involved, that task could be left to the drafting group.

44. It might be helpful to compare paragraphs (a) to (d) of article 15 bis with paragraph 3 of the commentary on article 18 in the Guide to Enactment (document A/CN.9/375). In that connection, he recalled that during the Commission's 502nd meeting several members had felt that the phrase "for reasons of economy and efficiency" in article 18 (3) should be made more explicit.

45. Mr. MORAN BOVIO (Spain), commending the idea of including articles on restricted tendering in the Model Law, said that details of wording could be settled by the drafting group.

46. Mr. LEVY (Canada) said he had doubts about making restricted tendering so visible, but if the Commission wished to accept the proposals before it, he would not object.

47. He presumed that the last phrase of paragraph (2) of article 36 bis - "except that publicity requirements shall not apply" - was intended to refer to the early stages of tendering, since publicizing of the outcome was required with all other procurement methods.

48. Mr. GRIFFITH (Observer for Australia) said that, like the Canadian representative, he was not sure about the wisdom of including separate articles on restricted tendering. The draft Model Law already contained provisions relating to restricted tendering which the Commission had discussed at length without reaching agreement. In such circumstances, he preferred that the existing language be left as it stood since it had the sanction of the Working Group.

49. If the Commission did decide to adopt the two articles, the reference to "small quantities" in paragraph (d) of article 15 bis should be brought into line with the corresponding phrase in paragraph (b) of article 17, which the Commission - at its 501st meeting - had decided to change from "low amount or value" to "small quantity or low monetary value".

50. Mr. AZZIMAN (Morocco), commending the proposal submitted by the Inter-American Development Bank, said that it would result in the Model Law's having a more logical structure - open tendering, the preferred method, accompanied by certain derogations dependent on specific conditions.

51. Noting that the language of the proposed articles would need to be harmonized with that employed elsewhere in the Model Law, he suggested that in paragraph (c) of article 15 bis and paragraph (2) of article 36 bis "public tendering" be replaced by "open tendering" (in contrast to restricted tendering) and that in paragraph (2) the word "prior" be inserted before "publicity".

52. Mr. JAMES (United Kingdom) said he too was not sure whether the introduction of two new articles was the best way of dealing with restricted tendering.

53. If article 15 bis was to be adopted, it would require a paragraph (e) dealing with "any other exceptional cases". He was not convinced that paragraphs (b) and (c) of article 15 bis provided valid reasons for recourse to restricted tendering. Nor did he see the point of the reference to "small quantities" (or something on the lines of "small quantity or low monetary value") in paragraph (d) given the basic principle that restricted tendering was justifiable only if the value of the contract and the costs of the procurement procedure were so out of balance as to render open tendering undesirable.

54. The second sentence in paragraph (1) of article 36 bis would need to be examined in the light of the decision taken earlier in the meeting with regard to article 6.

55. Mr. TUVAYANOND (Thailand) agreed with the representative of the United Kingdom about the need, in article 15 bis, for a paragraph (e) dealing with "any other exceptional cases".

56. Regarding paragraph (b) of article 15 bis, he considered the words "duly justified" to be unnecessary; it was for the national authorities of enacting States to decide what constituted an "urgent need".

57. Like the observer for Australia, he did not like the formulation "small quantities" in paragraph (d) of article 15 bis; perhaps that paragraph might be amended to read "the procurement is of minor significance".

58. With regard to paragraph (1) of article 36 bis, he questioned the use of the word "reputable" in the second sentence as it might lead to discrimination against new firms to the benefit of established ones. He thought that "reasonable" would be more appropriate than "sufficient" in the third sentence.

The meeting rose at 5.05 p.m.